No. MC–FC–73980. By order entered October 11, 1972, the Motor Carrier Board approved the transfer to Wilkerson Trucking Co., Inc., Lenoir City, Tenn., of the operating rights set forth in Certificates Nos. MC–124632, MC–124632 (Sub-No. 2), MC–124632 (Sub-No. 4), MC–124632 (Sub-No. 6), MC–124632 (Sub-No. 8), MC–124632 (Sub-No. 11), and MC–124632 (Sub-No. 12), issued by the Commission January 15, 1963, June 13, 1963, November 13, 1963, August 23, 1963, January 22, 1964, August 3, 1967, and August 12, 1968, respectively, and those in Permit No. MC–128985 (Sub-No. 1), issued December 9, 1969, to M. L. Wilkerson, doing business as Wilkerson Trucking Co., Lenoir City, Tenn., authorizing the transportation of calcium chloride, and dry calcium chloride in bags, dry ammonium nitrate fertilizer, ammonium nitrate fertilizer in bags, dry fertilizer and fertilizer material, petroleum and petroleum products, except in bulk, and petroleum products, in containers, from, to, or between points in Ohio, Tennessee, Kentucky, West Virginia, North Carolina, and Pennsylvania, as to the certificates, and as to the permit certain specified commodities, from, to, or between points in Tennessee, Minnesota, Iowa, Missouri, Arkansas, Louisiana, Wisconsin, Illinois, Mississippi, Michigan, Indiana, Kentucky, Tennessee, Alabama, Ohio, Pennsylvania, West Virginia, Virginia, North Carolina, South Carolina, Georgia, Florida, Maine, New Hampshire, Vermont, New York, Massachusetts, Rhode Island, Connecticut, New Jersey, Delaware, Maryland, and the District of Columbia. Dual operations authorized. Walter Harwood, 1822 Parkway Towers, Nashville, TN 37219, attorney for applicants.

No. MC–FC–73991. By order entered October 10, 1972, the Motor Carrier Board approved the transfer to Yarbrough Transfer Co., Winston-Salem N.C., of the operating rights set forth in Certificates Nos. MC–37828 and MC–37828 (Sub-No. 2), issued September 17, 1971, and July 28, 1972, respectively, to Coburn Moving and Storage Co., Inc., Roanoke, Va., authorizing the transportation of scrap iron, coal, household goods, building materials and lumber, farm produce, livestock, and machinery, from, to, or between points and places in Virginia, West Virginia, and North Carolina. Wesley D. Bailey, 1918 Wachovia Building, Winston-Salem, NC 27107, attorney for applicants.

No. MC–FC–35446. By order of October 6, 1972, the Motor Carrier Board approved the lease to Moore Transportation Co., Inc., Fort Worth, Tex., of the Certificate in No. MC–106676 and the Certificate of Registration in No. MC–106676 (Sub-No. 2) both issued September 18, 1970, to Orval Hall Trucking Co., a corporation, Fort Worth, Tex., and acquired by Don Moore, doing business as Moore Transportation Co., Fort Worth, Tex., pursuant to order in MC–FC–73577, the former authorizing the transportation of machinery, materials, supplies, and equipment, incidental to, or used in the gas and petroleum industry, between and over specified routes to Uvalde, Houston, and Freeport, Tex., including points on the indicated portions of the highways specified, and the latter evidencing a right of the holder to engage in transportation in interstate or foreign commerce as described in Certificate No. 5051, dated November 18, 1954, transferred and reissued April 9, 1970, by the Railroad Commission of Texas. Dan Felts, Post Office Box 2207, Austin, TX 78767, attorneys for applicants.

No. MC–FC–73577. By order of October 6, 1972, the Motor Carrier Board approved the transfer to Don Moore, doing business as Moore Transportation Co., Fort Worth, Tex., of the certificate in No. MC–106676 and the certificate of registration in No. MC–106676 (Sub-No. 2) both issued September 18, 1970, to Orval Hall Trucking Co., a corporation, Fort Worth, Tex., the former authorizing the transportation of machinery, materials, supplies, and equipment, incidental to, or used in the gas and petroleum industry, between and over specified routes to Uvalde, Houston, and Freeport, Tex., and including points on the indicated portions of the highways specified, and the latter evidencing a right of the holder to engage in transportation in interstate or foreign commerce as described in Certificate No. 5051, dated November 18, 1954, transferred and reissued April 9, 1970, by the Railroad Commission of Texas. Dan Felts, Post Office Box 2307, Austin, TX 78767, attorney for applicants.

[SEAL] ROBERT L. OSWALD,
Secretary.

[FR Doc.72–18249 Filed 10–25–72;8:50 am]

PORT ROYAL MARINE CORP.

Notice of Filing of Petition for Declaratory Order

OCTOBER 20, 1972.

No. W–C–22, Port Royal Marine Corp.—Declaratory Order—"LASH" Towage Operations.

Petitioner: Port Rayol Marine Corp., 310 East Bay Street, Savannah, GA. Petitioner's representatives: Jacob P. Billig and Terence D. Jones, 1108 16th Street NW., Washington, DC 20036.

Petitioner is a Georgia corporation engaged in the business of providing a substitute means of propulsion for vessels used in lighter-aboard-ship (LASH) services operated in foreign commerce by ocean carriers of all flags. The lighters propelled by petitioner are comparatively small vessels loaded with cargo at ports in the United States and destined to points in foreign countries or loaded at ports in foreign countries and destined for ports in the United States. The LASH vessel itself does not move under its own propulsion. It must be either carried by a LASH mother vessel, usually with other LASH lighters, or placed in the water and pushed or towed by tugboats or pushboats. The lighters, which are owned by the ocean carrier who owns the mother vessel or by LASH ocean carrier, are in themselves documented and registered United States or foreign flag vessels, carrying their registry papers on board.

LASH mother vessels anchor or moor at or near Savannah, or other major ports, where the LASH mother vessel discharges into the water LASH lighters loaded with cargo of all types destined to other ports up and down the South Atlantic coast. The mother vessel will also receive at Savannah lighter vessels from other South Atlantic ports, which lighters are destined to points in foreign countries. Petitioner provides tugboats and pushboats to transport loaded and empty LASH lighters between the LASH mother vessel anchored or moored near Savannah or other major United States ports, on the one hand, and, on the other, the South Atlantic ports at which the lighters originate or to which they are destined. In the exchange of the fully loaded LASH lighters between the mother vessel and petitioner's boats, petitioner states that no transfer of cargo occurs.

In all cases, the origin and destination points named in the port to port ocean bill of lading, which is solely utilized in the subject movements, will be a point in a foreign country and a United States South Atlantic port. U.S. customs jurisdiction is said to attach to this cargo at the port of ultimate origin or destination, not at the port where the lighter is transferred to or from the mother vessel. All of the involved cargo is solicited by the LASH ocean carrier or its agents and moves under through rates on a through bill of lading issued by the ocean carrier. Petitioner does not advertise or offer any services to the public at large, but only to ocean common carriers by water subject to the jurisdiction of the Federal Maritime Commission (FMC). In each instance the ocean carrier appears to assume complete responsibility for the transportation of all property, and for any loss and damage to the cargo or the lighter between the points designated on the bill of lading. The ocean carrier receives all revenues derived from the movement, paying petitioner an agreed-upon fee for its propelling services.

It is the position of petitioner that the services it provides for LASH lighters are not subject to the jurisdiction of this Commission because (1) there is no transfer of lading among vessels, and thus no transshipment, (2) the services are performed by it solely as the agent of the LASH ocean carrier in connection with a foreign port-to-port movement wholly by water undertaken entirely by that ocean carrier, and (3) to the extent that the service involves the movements of lighters between the mother vessel anchored at or near a major port, and that port, such service constitutes "transportation by water solely within the limits of a single harbor or between places in contiguous harbors

* * *" and is thus exempt from regulation under section 303(g)(1) of the act, 49 U.S.C. 903(g)(1).

On May 12, 1972, this Commission and the Federal Maritime Commission issued a joint jurisdictional statement concerning LASH operations, wherein it was stated, in essence, that the LASH lighters are not subject to Commission jurisdiction. The final sentence of that joint statement reads as follows:

> However, the towage of barges between the United States ports, when undertaken by other than the ocean carrier, is subject to the jurisdiction of the Interstate Commerce Commission.

Notwithstanding this statement, petitioner believes that this Commission is without jurisdiction in the matter. It argues that if the cargo itself is not the subject of a transshipment when being transferred in the lighter between the mother vessel and the water, then neither is petitioner's operation in which it merely acts as a vehicle of propulsion for the same lighters. Petitioner also believes that its activities are to be distinguished from those recently found to be subject to Commission jurisdiction in Sacramento-Yolo Port District, Petition, 341 I.C.C. 105 (1972), because in the cited case a transfer of lading was found to occur.

Any interested person (including petitioner) desiring to participate may file with this Commission an original and (6) six copies of his written representations, views, or argument in support of, or against, the petition within 30 days from the date of publication of this notice in the FEDERAL REGISTER. A copy of each such document should be served upon petitioner's representatives.

By the Commission.

[SEAL] ROBERT L. OSWALD,
Secretary.

[FR Doc.72-18251 Filed 10-25-72;8:50 am]

[Ex Parte 267]

SUN OIL COMPANY OF PENNSYLVANIA

Increased Freight Rates, 1971

Order. In the matter of waiver of Rule 22 of the General Rules of Practice.

Upon consideration of the record in the above-captioned proceeding, including: the report and order, 339 I.C.C. 125 (1971); and the petition filed on July 10, 1972, by Sun Oil Company of Pennsylvania requesting the Commission to enter a declaratory order finding that the increase on commodity rates for all export traffic (or, in the alternative, on refined petroleum, petroleum products, and naphthalene) authorized in the report and order was and is limited to 12 percent, regardless of the foreign destination of the traffic, and for certain affirmative action by the Commission in connection with the requested finding; and

It appearing, that Sun Oil Company's petititon does not comply with Rule 22 of the Commission's General Rule of Practice, 49 CFR 1100.22, requiring service of every pleading upon all parties to proceedings;

It further appearing, that the Commission's staff informed petitioner that the petition would not be processed until compliance had been effected with Rule 22;

It further appearing, that by letter dated September 1, 1972, petititoner stated that compliance with Rule 22 would be unduly burdensome because most of the parties to this proceeding would not have an interest in or be affected by the relief sought;

It further appearing, that the interests of justice will be best served by treating petitioner's letter of September 1, 1972, as a petition for waiver of Rule 22;

And it further appearing, that authorizing a waiver of Rule 22, as conditioned below, is appropriate in this instance;

Wherefore, and for good cause:

It is ordered, That the requirement of the said Rule 22 requiring service of every pleading upon all parties to proceedings be, and it is hereby, waived in this proceeding solely to permit the filing of the instant petition and replies thereto, provided that the petitioner herein furnish a copy of its petition to any party of record in this proceeding requesting such service. Requests for service should be addressed to Mr. Lee A. Christiansen, Director of Traffic, Sun Oil Co., 1608 Walnut Street, Philadelphia, PA 19103.

It is further ordered, That petitioner herein be, and it is hereby, required to submit a revised certificate of service, as it has agreed to do in its letter of September 1, 1972, showing service upon all parties to this proceeding known to have an interest in the rates on refined petroleum petroleum products, and naphthalene and upon each of the Commission's regional offices.

It is further ordered, That any party wishing to participate in the determination of this matter, should the Commission exercise its discretion in entertaining this petition for a declaratory order shall notify the Commission's Office of Proceedings to that effect within 30 days from that date of publication of this order in the FEDERAL REGISTER; that a service list for use in connection with this petition only shall thereafter be served upon the petitioner and all replicants; and that service of pleadings may be limited to those parties.

And it is further ordered, That notice of this action be given to the public by depositing a copy of this order in the Office of the Secretary of the Commission and by publication in the FEDERAL REGISTER, and that notice of the filing of the petition and of this action be further made by service of this order on all parties to this proceeding.

Dated at Washington, D.C., this 11th day of October 1972.

By the Commission, Commissioner Bush.

[SEAL] ROBERT L. OSWALD,
Secretary.

[FR Doc.72-18252 Filed 10-25-72;8:50 am]

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PART II

FEDERAL TRADE COMMISSION

■

COOLING-OFF PERIOD FOR DOOR-TO-DOOR SALES

TRADE REGULATIONS RULE AND STATEMENT OF BASIS AND PURPOSE

Title 16—COMMERCIAL PRACTICES

Chapter I—Federal Trade Commission

SUBCHAPTER D—TRADE REGULATION RULES

PART 429—COOLING-OFF PERIOD FOR DOOR-TO-DOOR SALES

Promulgation of Trade Regulation Rule and Statement of Its Basis and Purpose

Introduction. The Federal Trade Commission, pursuant to the Federal Trade Commission Act, as amended, 15 U.S.C. 41, et seq., and the provisions of Subpart B, Part 1 of the Commission's procedures and rules of practice, 16 CFR 1.11 et seq., has conducted a proceeding for the promulgation of a Trade Regulation Rule pertaining to a cooling-off period for door-to-door sales. Notice of this proceeding, including a proposed rule, was published in the FEDERAL REGISTER on September 29, 1970 (35 F.R. 15164). Interested parties were thereafter afforded opportunity to participate in the proceeding through the submission of written data, views, and arguments, and to appear and express their views orally and to suggest amendments, revisions, and additions to the proposed rule.

After it had considered the suggestions, criticisms, objections, and other pertinent information in the record, the Commission on February 17, 1972, published a revised proposed rule in a notice in the FEDERAL REGISTER (37 F.R. 3551) extending an opportunity to interested parties to submit data, views, or arguments regarding the revised proposed rule. A period of 30 days was allowed for the submission of written statements.

The Commission has now considered all matters of fact, law, policy, and discretion, including the data, views, and arguments presented on the record by interested parties in response to the notices, as prescribed by law, and has determined that the adoption of the Trade Regulation Rule and its Statement of Basis and Purpose set forth herein is in the public interest.

§ 429.1 The Rule.

In connection with any door-to-door sale, it constitutes an unfair and deceptive act or practice for any seller to:

(a) Fail to furnish the buyer with a fully completed receipt or copy of any contract pertaining to such sale at the time of its execution, which is in the same language, e.g., Spanish, as that principally used in the oral sales presentation and which shows the date of the transaction and contains the name and address of the seller, and in immediate proximity to the space reserved in the contract for the signature of the buyer or on the front page of the receipt if a contract is not used and in bold face type of a minimum size of 10 points, a statement in substantially the following form:

"You, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation form for an explanation of this right."

(b) Fail to furnish each buyer, at the time he signs the door-to-door sales contract or otherwise agrees to buy consumer goods or services from the seller, a completed form in duplicate, captioned "NOTICE OF CANCELLATION," which shall be attached to the contract or receipt and easily detachable, and which shall contain in 10-point bold face type the following information and statements in the same language, e.g., Spanish, as that used in the contract:

NOTICE OF CANCELLATION

(enter date of transaction)

(date)

You may cancel this transaction, without any penalty or obligation, within 3 business days from the above date.

If you cancel, any property traded in, any payments made by you under the contract or sale, and any negotiable instrument executed by you will be returned within 10 business days following receipt by the seller of your cancellation notice, and any security interest arising out of the transaction will be canceled.

If you cancel, you must make available to the seller at your residence, in substantially as good condition as when received, any goods delivered to you under this contract or sale; or you may, if you wish, comply with the instructions of the seller regarding the return shipment of the goods at the seller's expense and risk.

If you do not agree to return the goods to the seller or if the seller does not pick them up within 20 days of the date of your notice of cancellation, you may retain or dispose of the goods without any further obligation.

To cancel this transaction, mail or deliver a signed and dated copy of this cancellation notice or any other written notice, or send a telegram, to

(name of seller)

at

(address of seller's place of business)

not later than midnight of

(date)

I hereby cancel this transaction.

(date)

(buyer's signature)

(c) Fail, before furnishing copies of the "Notice of Cancellation" to the buyer, to complete both copies by entering the name of the seller, the address of the seller's place of business, the date of the transaction, and the date, not earlier than the third business day following the date of the transaction, by which the buyer may give notice of cancellation.

(d) Include in any door-to-door contract or receipt any confession of judgment or any waiver of any of the rights to which the buyer is entitled under this section including specifically his right to cancel the sale in accordance with the provisions of this section.

(e) Fail to inform each buyer orally, at the time he signs the contract or purchases the goods or services, of his right to cancel.

(f) Misrepresent in any manner the buyer's right to cancel.

(g) Fail or refuse to honor any valid notice of cancellation by a buyer and within 10 business days after the receipt of such notice, to: (i) Refund all payments made under the contract or sale; (ii) return any goods or property traded in, in substantially as good condition as when received by the seller; (iii) cancel and return any negotiable instrument executed by the buyer in connection with the contract or sale and take any action necessary or appropriate to terminate promptly any security interest created in the transaction.

(h) Negotiate, transfer, sell, or assign any note or other evidence of indebtedness to a finance company or other third party prior to midnight of the fifth business day following the day the contract was signed or the goods or services were purchased.

(i) Fail, within 10 business days of receipt of the buyer's notice of cancellation, to notify him whether the seller intends to repossess or to abandon any shipped or delivered goods.

NOTE 1: *Definitions.* For the purposes of this section the following definitions shall apply:

(a) *Door-to-Door Sale*—A sale, lease, or rental of consumer goods or services with a purchase price of $25 or more, whether under single or multiple contracts, in which the seller or his representative personally solicits the sale, including those in response to or following an invitation by the buyer, and the buyer's agreement or offer to purchase is made at a place other than the place of business of the seller. The term "door-to-door sale" does not include a transaction:

(1) Made pursuant to prior negotiations in the course of a visit by the buyer to a retail business establishment having a fixed permanent location where the goods are exhibited or the services are offered for sale on a continuing basis; or

(2) In which the consumer is accorded the right of recision by the provisions of the Consumer Credit Protection Act (15 U.S.C. 1635) or regulations issued pursuant thereto; or

(3) In which the buyer has initiated the contact and the goods or services are needed to meet a bona fide immediate personal emergency of the buyer, and the buyer furnishes the seller with a separate dated and signed personal statement in the buyer's handwriting describing the situation requiring immediate remedy and expressly acknowledging and waiving the right to cancel the sale within 3 business days; or

(4) Conducted and consummated entirely by mail or telephone; and without any other contact between the buyer and the seller or its representative prior to delivery of the goods or performance of the services; or

(5) In which the buyer has initiated the contact and specifically requested the seller to visit his home for the purpose of repairing or performing maintenance upon the buyer's personal property. If in the course of such a visit, the seller sells the buyer the right to receive additional services or goods other than replacement parts necessarily used in performing the maintenance or in making the repairs, the sale of those additional goods or services would not fall within this exclusion; or

(6) Pertaining to the sale or rental of real property, to the sale of insurance or to the sale of securities or commodities by a broker-dealer registered with the Securities and Exchange Commission.

(b) *Consumer Goods or Services*—Goods or services purchased, leased, or rented primarily for personal, family, or household purposes, including courses of instruction or training regardless of the purpose for which they are taken.

(c) *Seller*—Any person, partnership, corporation, or association engaged in the door-to-door sale of consumer goods or services.

(d) *Place of Business*—The main or permanent branch office or local address of a seller.

(e) *Purchase Price*—The total price paid or to be paid for the consumer goods or services, including all interest and service charges.

(f) *Business Day*—Any calendar day except Sunday, or the following business holidays: New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.

NOTE 2: *Effect on State Laws and Municipal Ordinances.*

(a) The Commission is cognizant of the significant burden imposed upon door-to-door sellers by the various and often inconsistent State laws which provide the buyer with the right to cancel door-to-door sales transactions. However, it does not believe that this constitutes sufficient justification for preempting all of the provisions of such laws or of the ordinances of the political subdivisions of the various States. The Record in the proceedings supports the view that the joint and coordinated efforts of both the Commission and State and local officials are required to insure that a consumer who has purchased from a door-to-door seller something he does not want, does not need, or cannot afford, is accorded a unilateral right to rescind, without penalty, his agreement to purchase the goods or services.

(b) This section will not be construed to annual, or exempt any seller from complying with the laws of any State, or with the ordinances of political subdivisions thereof, regulating door-to-door sales, except to the extent that such laws or ordinances, if they permit door-to-door selling, are directly inconsistent with the provisions of this section. Such laws or ordinances which do not accord the buyer, with respect to the particular transaction, a right to cancel a door-to-door sale which is substantially the same or greater than that provided in this section, or which permit the imposition of any fee or penalty on the buyer for the exercise of such right, or which do not provide for giving the buyer notice of his right to cancel the transaction in substantially the same form and manner provided for in this section, are among those which will be considered directly inconsistent.

AUTHORITY: The provisions of this Part 429 issued under 38 Stat. 717, as amended; 15 U.S.C. 41–58.

Effective: To be announced.

Promulgated: October 18, 1972.

By the Commission.

CHARLES A. TOBIN,
Secretary.

STATEMENT OF BASIS AND PURPOSE

CHAPTER I. HISTORY OF THE PROCEEDING

The Commission announced on September 29, 1970, the initiation of a proceeding for the promulgation of a trade regulation rule requiring a cooling-off period for door-to-door sales.[1] All interested persons were invited to file written data, views, or arguments concerning the proposed rule or to present such information orally at public hearings in Washington, D.C., and Chicago.[2]

When the hearings were convened in March 1971, Mr. William D. Dixon, Assistant Director for Industry Guidance, Bureau of Consumer Protection, presided.[3] Every person who had expressed a desire to present his views orally at these hearings was accorded the opportunity of doing so. The 485-page transcript of the Washington hearings and the 416-page transcript of the Chicago hearings have been included in the public record of the proceeding, which also contains 2,477 pages of written comments and a separate volume of documentary exhibits.[4] References to the transcript of the public hearings are preceded by the prefix "Tr." and references to the written comments are preceded by the prefix "R."

CHAPTER II. BACKGROUND

The concept of recognizing the consumer's right to rescind or cancel contracts or purchases made in the home originated in 1962 with a committee appointed by the President of the British Board of Trade.[5] The ensuing years have seen the adoption of so-called cooling-off legislation by a number of jurisdictions of the British Commonwealth, 33 of our States, the District of Columbia and at least seven cities.[6]

The National Conference of Commissioners on Uniform State Laws released its revised final draft of the Uniform Consumer Credit Code in February 1969. It includes a cooling-off provision whereby the consumer has a right to cancel a home solicitation sale until midnight of the third-business day after the day on which the buyer signs the agreement or offer to purchase.[7] To date only Colorado, Idaho, Indiana, Oklahoma, Utah, and Wyoming have adopted the code.[8]

In 1967 Senator Magnuson introduced a bill to provide for a cooling-off period in door-to-door sales.[9] Although hearings on the bill were held in 1968 and it was favorably reported,[10] it was not acted upon by the Senate. In the course of the hearings, statements in support of the objectives of the bill were made by the Federal Trade Commission and other Federal agencies.[11] The report of the Senate hearings contains a complete recitation of the views of those who support as well as those who oppose the cooling-off concept, and it also is a valuable source of information as to the practices and problems of door-to-door sellers generally.

The interest in the concept of providing the consumer with a nonjudicial weapon to use against the door-to-door seller is also reflected in the publication of several studies which commented favorably on the proposal.[12] In addition, in September 1969, the UCLA Law Review published the report of its survey of the direct selling industry.[13] This comprehensive report covered sales practice problems, debt collection problems, preventive remedies, and after-sale remedies. It concluded that the cooling-off concept should be encouraged, although it recognized that it would not provide a complete remedy for all of the consumer problems arising out of door-to-door sales.[14]

On August 6, 1969, the Commission included for the first time in an order to cease and desist a provision requiring a respondent to allow a 3-day period of grace during which all contracts negotiated in the consumer's home may be rescinded by the consumer.[15] In ordering this relief, the Commission said:

> This will serve as a cooling-off period during which any consumer, who may be subjected to the unfair pressures resulting from the deceptions we have discussed or similar deceits, may reevaluate and cancel her purchase.[16]

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[1] 35 F.R. 15164.

[2] The public hearings were originally scheduled to begin on Jan. 19, 1971. At the request of industry members, these proceedings were stayed for 45 days. 36 F.R. 945; 36 F.R. 1211. The hearings were held in Washington from Mar. 8 through Mar. 11, 1971, and in Chicago from Mar. 22 to Mar. 24, 1971.

[3] Pursuant to Commission directive, 35 F.R. 15164.

[4] File No. 215–28.

[5] Committee on Consumer Protection, Final Report, Cmnd. No. 1781 (1962).

[6] The United Kingdom, the Australian States of Victoria and Western Australia, the Canadian Provinces of Saskatchewan, Manitoba, Alberta, Ontario, Newfoundland, and British Columbia, and the States of Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, Vermont, Virginia, Washington, Wisconsin, Wyoming, the Ohio cities of Akron, Columbus, Grandview, Moraine, Westerville and Whitehall, and Joplin, Mo.

[7] Uniform Consumer Credit Code, Article 2, Part 5, 2.501–2.505.

[8] Colorado, Laws 1971, H. 1076; Idaho, Laws 1971, Ch. 299; Indiana, IC 1971, T. 24, Art. 4.5, Secs. 1.101–6.202; Oklahoma, 14 A.O.S. 1969 Supp., Secs. 1.101–9.103; Utah, Anno. Code Secs. 70B–1.101–70B–9.103; Wyoming, Laws 1971, Ch. 191.

[9] S. 1599, 90th Congress, 1st Sess.

[10] S. Rept. No. 1417, 90th Congress, 2d Sess.

[11] Hearings on S. 1599 before the Consumer Subcommittee of the Senate Committee on Commerce, 90th Cong., 2d Sess., Ser. 90–63 (1968).

[12] Sher, The "Cooling-Off" Period in Door-to-Door Sales, 15 UCLA Law Review, 717 (1968); Meserve, The Proposed Federal Door-to-Door Sales Act—An Examination of Its Effectiveness as a Consumer Remedy and the Constitutional Validity of Its Enforcement Provisions, 37 The Geo. Wash. Law Review, 1171 (1969).

[13] The Direct Selling Industry: An Empirical Study, 16 UCLA Law Review 890 (1969).

[14] Id., p. 1016.

[15] In the Matter of Household Sewing Machine Co., Inc., et al., Docket No. 8761, CCH Trade Reg. Rep. Transfer Binder 1967–70, par. 18,882.

[16] *Ibid*, page 21,216.

Since the Household Sewing case the Commission has included similar provisions in orders against other members of the direct selling industry.[17]

By way of summary, in recent years cooling-off laws and regulations have been widely supported by State legislatures, government agencies, and others who have studied the problems associated with door-to-door sales. We turn next to the characteristics of door-to-door sales which have led to the search for and adoption of this remedy.

CHAPTER III. NATURE OF DOOR-TO-DOOR SALES

Industry members prefer to characterize the type of sale which was the subject of this proceeding as a "home solicitation sale" because they claim that the term "door-to-door sale" is too narrow and obsolete.[18] However, it is generally agreed that both terms encompass, essentially, the selling of products on a person-to-person basis in the home, and that a company which distributes its products in this manner is a member of the direct selling industry.[19]

This method of distribution is defended by many. Thomas B. Curtis, vice president and general counsel of Encyclopedia Britannica, Inc., said:

> * * * home selling has been a traditional method of distributing goods since the earliest history of this country when the periodic visits of the spice merchant or tinker would be anticipated with delight in the settler's household. It continues to be an important factor in American retailing. Billions of dollars worth of goods are sold in the home each year and home selling provides jobs for millions of people * * *.[20]

Personal contact between the salesman and the customer in the home of the buyer is the dominant characteristic of the door-to-door sale.[21] Whether the sale results from a contact initiated by the salesman or from the salesman's response to an unsolicited call from the consumer the dominant characteristic—personal contact in a nonbusiness setting—is present in both situations.[22]

Direct sellers include route salesmen such as those who take orders for home delivery of milk, laundry, and drycleaning. Another type of direct seller is the local businessman engaged in the repair and sale of such home appliances as furnaces, air conditioners, and hot water heaters. In many cases such repairs or replacements are needed to meet an emergency and the contact with the seller is initiated on a spontaneous basis by the consumer.[23]

The record reflects that retailers of furniture, draperies, and carpets, while conducting most of their business in their stores, often send "decorator salesmen" to the home, generally in response to an invitation, for the purpose of permitting the consumer to choose their products where they will be used.[24]

Still another type of direct seller is the producer or distributor of such products as encyclopedias, pots and pans, baby furniture, vacuum cleaners, magazines, Bibles, and portrait plans, who sells either exclusively or primarily by the use of door-to-door salesmen.[25]

The ghetto peddler is the most distinctive of all direct sellers. He sells a variety of wares in the inner-city areas, on a repetitive basis and almost on a fixed schedule.[26] The ghetto peddler visits his customers frequently to collect payments and make repeat sales. He may provide a check cashing service for public assistance checks, and will often quote the prices of his merchandise in terms of weekly payments. He endeavors to become a family friend and counselor and to become a significant part of the social circles in which his customers move.[27] Peddlers, however, are not the only form of door-to-door salesmen operating in the ghetto. The record is replete with examples of many forms of door-to-door sales to the poor who live in these areas.[28]

The foregoing indicates the breadth and variety of the direct selling industry.[29] We turn next to an examination of the problems associated with door-to-door selling, and whether those problems

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[17] *Owen W. Lofthus*, t/a Metro Distributors, Docket C–1793, Sept. 15, 1970; Universal Chemicals, Inc., et al., Docket No. 9752, May 13, 1970; Windsor Distributing Co., et al., Docket No. 8773, Mar. 6, 1970; aff'd in Windsor Distributing Co., et al. v. FTC, 437 F. 2d 443 (3d Cir. 1971).

[18] The definition of "door-to-door sale" contained in the proposed rule was the subject of considerable comment. The ad hoc industry committee which formulated the alternative rule which is discussed at length in the text herein, suggested that the term "home solicitation sale" be used instead of "door-to-door sale" because the former term is used by 12 States and appears in the Uniform Consumer Credit Code UCCC, sec. 2.301. Neither the term "door-to-door sale" nor "home solicitation sale" is completely descriptive of the scope of the rule. Since the Commission's actions respecting the term "door-to-door sale" have been widely publicized, the adoption of a different title at this time would unnecessarily confuse the picture.

[19] J. Robert Brouse, president, Direct Selling Association (R. 924).

[20] Tr. 47.

[21] Jolson, Consumer Attitudes Toward Direct-To-Home Marketing Systems, 1 (New York, 1970). This view was supported by a statement in the record by the National Consumer Law Center: "It is a well known fact that your chances of selling a product are immeasurably increased if you can get the warm body of a buyer into the presence of a skilled salesman. Personal contact is still the key to closing a sale with the consumer * * * this fact is understood all too well by the door-to-door selling industry. * * *" (R. 842).

[22] Statement, Richard A. Givens, attorney in charge, New York Field Office, Federal Trade Commission (Tr. 98).

[23] Deception and other unfair practices are, of course, widely used in these areas. See for example, Holland Furnace Co. v. F.T.C., 295 F. 2d 302 (1961); D. 8690, Royal Construction Co., et al.; D. 8738, All-State Industries of North Carolina, Inc., et al.; 1967–70 CCH Trade Reg. Transfer Binder, para. 18740 (1967). The necessity for emergency repairs is recognized in section 226.9(e) of Federal Reserve Regulation Z and in sec. 2.503(1) of the Uniform Consumer Credit Code.

[24] Statement of the National Retail Furniture Association (R. 402–403). While direct selling usually by-passes both the retailer and the wholesaler to reach to consumer, direct selling methods are used by many other merchants who maintain retail or wholesale businesses. For example, the National Association of Music Merchants, Inc., which represents music retailers reports that many of its members consummate many sales in the home even though the majority of their sales are made in stores (R. 700). Other direct sellers operating out of local business establishments include vendors of vacuum cleaners (Kirby Co. of New Mexico, R. 576), cosmetics, toiletries, and home-care products (Douglas R. White, Holiday Magic Distributor, R. 528), storm windows and doors (Rusco Combination Window Distributors, R. 523), and water conditioning equipment (Statement, Water Conditioning Foundation, R. 1403).

[25] G. Fred Davis, National Photographers Album Co. (R. 166); Dortch Oldham, president, The Southwestern Co. (R. 234–235); L. M. Shwiller, assistant vice president, Atlantic Portrait Plan (R. 339); Thomas B. Curtis, vice president-general counsel, Encyclopedia Britannica, Inc. (R. 778); Brouse, supra, note 19 at R. 1001–1006.

[26] Theresa H. Clark, Chief of Program Coordination, United Planning Organization, said, "Experience has taught us that communities where the poor live are green pastures for door-to-door salesmen with their arms stuffed full of blankets, clocks, pictures, magazines, books, and bedspreads. There is no end to what they sell. Not only that, but if, by chance, the residents should mention something that a given salesman does not have ready, give him 3 minutes on the telephone and he can get it * * *" (Tr. 347). Mr. Edwards Sard, National Association of Installment Cos., in describing the peddler said, "* * * in a number of cases, where it is a question of opening a new account, many will use the procedure of taking * * * an inexpensive item * * * and * * * go up and down the street and make sales without verifying credit at all * * * if she makes her payments * * *. She has established her credit relationship with the installment firm. Then, when the appropriate time comes, they will try to make the add-on sale. In other words, they are looking for repeat business, not for the initial sale." (Tr. 232–233.)

[27] Hearings on S. 1599, supra note 11, at pages 30–41.

[28] "The salesman in the low-income neighborhood employs high pressure tactics. The salesman is concerned only with the signed order * * *. The use of psychologically coercive tactics can, therefore, result in the consumer purchasing an item that he neither wants or needs * * *. Finally, once the contract is signed, the merchant's attention is shifted from consumer satisfaction to enforcement of payment." (Statement of the Legal Assistance Foundation of Champaign County, Inc., R. 1918–19.) "Ghetto dwellers have been conned by door-to-door salesmen pretending to have inside information on their children's achievements in school. 'You have been selected to purchase an encyclopedia because your son Johnny is at the top of his second grade class goes one spiel. 'He needs this encyclopedia to stay on top'." (Betty Furness, Chairman, New York State Consumer Protection Board, Tr. 76.)

[29] According to the 1971 membership roster of the Direct Selling Association, its 91 active members sell some 63 commodity classifications (R. 990–1006).

are of such a magnitude as to justify special treatment by the Commission.[30]

CHAPTER IV. PROBLEMS ASSOCIATED WITH DOOR-TO-DOOR SALES

From the record in these proceedings, it is clear that the frequency and number of complaints arising out of door-to-door sales is substantial.[31] Those involved in legal aid programs and consumer protection activities were particularly vociferous in their condemnation of the practices of some door-to-door sellers.[32]

The complaints of consumers regarding door-to-door salesmen fall within five basic headings. These are: (1) Deception by salesmen in getting inside the door; (2) high pressure sales tactics; (3) misrepresentation as to the quality, price, or characteristics of the product; (4) high prices for low-quality merchandise; and (5) the nuisance created by the visit to the home by the uninvited salesmen.[33]

A. *Deceptive door openers*

The record contains evidence of widespread use of deception to obtain the person-to-person contact between the salesman and the consumer which is essential to the door-to-door salesman.[34]

The various schemes and devices used to open the door for the salesman are almost limitless in number. All of these devices are designed to convey to the consumer, at least initially, that the visitor is not going to attempt to sell him anything. Thus, the salesman may say that he is conducting a survey, is engaged in a brand identification program, or is connected with an advertising or other promotional program.[35] Some companies seek to pave the way for the salesman's admission into the home by advertising free gifts or a free demonstration,[36] always without obligation, provided the consumer answers an advertisement or responds favorably to a telephone offer of information.[37] Others use the cold canvass method wherein the salesman makes the initial contact on the doorstep. By its terms, most "door openers" must be misleading to a degree, or the salesman will simply not get into the home.[38]

Once the salesman has made the person-to-person contact with the consumer the stage is set for the use of high-pressure sales tactics and the other practices which the purchasers in the homes have found to be so objectionable.

B. *High-pressure sales tactics*

High-pressure sales tactics are the leading cause for consumer complaints about door-to-door selling. The use of such tactics is of course present to a degree in all forms of selling. The door-to-door sale, however, seems to be particularly susceptible to the use of these tactics. While various forms of misrepresentation may be utilized in the door-to-door sale, high-pressure sale techniques are almost always used. This explains the high degree of success of the glib, fast-talking, and persistent door-to-door salesman in selling a product which the

[30] Victor P. Buell, a marketing expert who appeared at the hearings on behalf of the direct selling industry said:

"Before one can take an intelligent stand on whether a proposed trade regulation * * * is sound he must determine at least two things: (1) Whether there is indeed a problem; and (2) if there is a problem, whether the proposed remedy is a sound approach to controlling the problem? On the first question it seems to me that there is. A review of testimony before legislative bodies and agencies, statements by local enforcement officials, statements by Better Business Association officials, and personal experiences as a consumer convinces me that there are in the direct selling field * * * some individuals who use deception and high pressure tactics to make sales." (Tr. 832.)

[31] For various 12-month periods the following complaints were reported by various official and nonofficial consumer protection agencies. Mrs. Jane Byrne, Commissioner, Department of Consumer Sales, Weights, and Measures of the city of Chicago, reported the receipt of 74 complaints (Tr. 498); the Wisconsin Attorney General's office received a total of 3,000 consumer complaints of which 670 arose out of home solicitation sales (Tr. 504); the Legal Service of Greater Miami, Inc., said that 15–20 percent of its complaints concerned door-to-door sales (Tr. 558); 68½ percent of the complaints processed by the Michigan Consumers Council related to problems involving door-to-door sales (Tr. 613); other States reporting a substantial number of such complaints include California (R. 274), Kentucky (R. 304), Ohio (Tr. 863), Oklahoma (R. 727–728), New York (Tr. 56), and Pennsylvania (Tr. 441).

[32] "* * * Without equivocation we can state that one of the most chronic and pernicous problems presented to the poverty lawyer is the resolution of issues created by high pressure, basically dishonest, selling practices of a far-too-large segment of the door-to-door sales industry. A tremendous amount of the time of the hard pressed and frequently over-burdened poverty lawyer is spent in attempting to extricate an unfortunate low-income purchaser from the economic and legal consequences of a home solicitation which was steeped in unfairness and deception." (National Consumer Law Center, R. 841.) "Last year, as editor of the Action Line column in Chicago Today newspaper, I handled 3,000–5,000 complaints dealing with door-to-door salesmen and their firms." (Kenan Heise, Tr. 737.) "* * * we have found one of the principal areas of abuse of high pressure sales tactics and consumer fraud is in the home solicitation sale. Many of our clients have been saddled with serious financial burdens simply because an aggressive salesman spent 3 or 4 hours with them late at night making numerous oral promises, wearing down their resistance and even intimidating them." (Legal Aid Service, Multnomah Bar Association, R. 684.) The Consumer Center of the Legal Aid Society of Metropolitan Denver wrote: "It has been our experience that the type of selling most subject to every variety of abusive practice is door-to-door selling * * *." (R. 540). "As an attorney at the Legal Aid Bureau handling hundreds of complaints and defending in court hundreds of defendants every year, I have been appalled at the great number and variety of unconscionable selling practices that seem to go hand-in-glove with door-to-door selling." (Ron Fritsch, attorney, Legal Aid Bureau, United Charities of Chicago, Tr. 515.)

[33] The Direct Selling Industry, supra, note 13, at 895.

[34] "The first step in door-to-door selling, the initial contact, is often where the deception starts. We have received many complaints that door-to-door salesmen pose as building inspectors, survey takers, or company representatives distributing 'free' products in order to gain entry to a house * * *" (Hon. Frank E. Moss, U.S. Senator from Utah, Tr. 37). Mr. Elasko Thigpen, director of the Greater Peoria Legal Aid Society said: "* * * One tactic that is used down our way is the salesman will come in with a check. They offer them $5. It is yours. You don't have to do anything. Just let me come in. He has the $5 check ready. He sits and sells them a vacuum cleaner * * *" (Tr. 899). "He said I'm not selling anything * * *." (D. 7751, Crowell-Collier Publishing Co., Trade Reg. Rep. Transfer Binder 1965–67, page 23069.) "I received a card in the mail which—informed me that I could win a $500 educational award plus I had a free gift coming. I was to phone and * * * and ask for Mr. Cunningham * * *" (Statement of David Hoel, R. 1489).

[35] D. 7751, supra, note 34 at pages 23067–23069, Docket C–1507, Hemphill Enterprises, Inc., et al., Trade Reg. Rep. Transfer Binder 1967–70, page 20,878. The Child's World, Inc., et al. Docket C–1452, Id. at page 20,892.

[36] One consumer reported responding to an advertisement of a school which offered a free aptitude test without obligation. Before he had returned the test he was visited by a salesman representing the school who sold him a course costing $35.59 a month for 24 months (R. 389). Another reported the receipt of a telephone call informing her that she had won several free magazine subscriptions. After she agreed to accept this gift a saleswoman called who sold her magazine subscriptions costing $133.50. Her bonus was Parents magazine although she had no children (R. 340). An uninvited salesman called at a home and sold the owner a water softener and conditioner costing $745.80. Although the owner did not know what was being offered for sale until after the salesman appeared, a long demonstration and sales pitch lasting until the wee hours of the morning resulted in the agreement to purchase (R. 100, 101).

[37] Frederick R. Sherwood, Chairman of the Ad Hoc Inter-Industry Committee, in describing his experiences as a door-to-door salesman said: "For instance the company that I represented prepared certain types of cards and mailing pieces, one, for instance, which offered a free map in connection with a preview or a brief demonstration of the product that I was representing" (Tr. 429).

[38] In reporting the results of his inquiry into the methods used to sell magazine subscriptions, Congressman Fred B. Rooney, testified at the hearings, "For example, almost all PDS magazine subscription sales—some of them involving contracts for $400 to $500 worth of magazines, books, and merchandise—begin with a telephone call to the prospective subscriber. Often, he is told he has been selected or designated to receive some form of free merchandise." (Tr. 13.) "It would be a tremendous handicap. I would say an impossible one for me to have to go to every door and say I am here to sell you a product." (Sherwood, note 37, supra, at Tr. 437.) "That this fact is understood all too well by the door-to-door selling industry is attested to by the gimmicks, and lies employed to gain entrance * * *" (Statement, National Consumer Law Center, R. 842).

customer often does not want, or does not need, or cannot afford.[39]

The high-pressure tactics used are not restricted to persistence and argumentativeness. Often subtle psychological techniques are used to instill in the consumer a desire for the product and to persuade him to purchase it.[40] Moreover, the circumstances under which a door-to-door sale is made is another reason for the success of high-pressure tactics and accounts for the frequency of their use.[41] Although he may not have previously considered the need for the merchandise or service, the consumer by admitting the salesman into his home has placed himself in a position of consenting to listen to a practiced, skilled, and almost hypnotic sales pitch which has been scientifically designed to create his desire for something he may not need, or cannot afford.[42]

C. *Misrepresentation of price and quality*

Misrepresentation on the part of salesmen regarding the quality, price, or characteristics of a product is the next source of consumer complaints regarding door-to-door sales. The quality and durability of products and services sold in the home frequently do not live up to the representations of the salesman.[43] Aside from instances in which a customer does not actually see the goods before the purchase is made, or have an opportunity to test the operation of a machine or device, the purchaser in the home is deprived of the opportunity to shop and compare values. He is thus forced to rely

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[39] One consumer wrote, "* * * after working 8 hours * * * I'm much too weary to defend myself against this type of selling * * * I also live alone, and many times I'll sign anything out of fear and frustration * * *" (R. 71). "People who write to our column display a fantastic sense of confusion as to why they made the deal. It is very common for us to hear, 'I was frightened of the man. I didn't know how to get rid of him.' * * * 'I was lonely and he was somebody to talk to.'" (Heise, supra, note 32, Tr. 738–739.) "The experience of the Bureau of Consumer Protection * * * is that the door-to-door selling industry frequently, and I would say mostly, utilizes the sales practices of a highly motivated nature which many consumers are unable to withstand. Frequently the persistence of the sales person in the home * * * makes it difficult for the consumer to withstand the highly motivated sales promotion." (Bette Clemens, director, Bureau of Consumer Protection, State of Pennsylvania, Tr. 439.) "Many more horror stories have been related to us * * * functional illiterates pressured into purchasing encyclopedias, homemakers without carpets * * * buying carpet sweepers * * *" (Memorandum, Ohio State Legal Services Association, R. 378). A housewife reported, * * * We were once a victim of one of those selling baby furniture * * * we were amazed that we had agreed to buy this expensive outfit that we didn't really need." (R. 423.) One woman described the purchase of $300 worth of baby furniture. She said she was 60 years old and didn't have a grandchild (Tr. 442). According to Lee Ellis, the village manager of Winnetka, Ill., an 80-year-old woman was sold $232.50 worth of magazine subscriptions (Tr. 658). A consumer said that she and her husband were sold an encyclopedia accompanied by a set of the Harvard Classics and a group of children's books all for $500 before the birth of their first child (R. 80). One couple expressed their chagrin about their purchase of an encyclopedia: "Recently we were approached about an encyclopedia (which we had no intention of buying for several more years) by a young man who came at 8:30 one evening. We are now sure that the trick is not to let them in the door * * *. After a 3-hour discussion we agreed to buy this set of books. Unfortunately we were tired by that time (11:30 p.m.) and our judgment was anything but good * * * in the morning we chastised ourselves for signing up for a $500 investment we did not even need at this time." (R. 88.)

[40] "The high pressure tactics of the skilled and often unscrupulous salesman breaks down the householder's resistance to his sales pitch. He is often selling a story not describing a product. The householder's conscience, shame, sympathy, pride, ignorance, or language difficulties are exploited. Equally capitalized upon is what we must honestly recognize as the householder's reluctance to throw the scoundrel out. In all honesty don't we all share the experience of at one time having tried to persuade an uninvited salesman to leave? One thing we should recognize about such an experience is that we found it very difficult to concentrate on the realities of the potential sales transaction. One wonders how many sales have been made just to be rid of the salesman. How many home solicitation contracts have been signed where the nature of the product and the legal consequences were unclear because of the buyers distraction or preoccupation with obtaining relief from the presence of the salesman." (Statement, National Consumer Law Center, R. 843.) "The poor and uneducated are particularly susceptible to the high pressure sales tactics employed * * * many of our clients have found themselves obligated to pay for items which they do not need and cannot afford as a result of the insidious psychological ploys employed by a door-to-dor salesman * * *" (Consumer Center, Legal Aid Society of Metropolitan Denver, R. 540).

[41] "* * * The consumer cannot end the discussion by leaving. On the contrary, if the salesman chooses to continue the conversation, the customer must somehow get the salesman to leave or agree to the transaction. The customer is vulnerable to the assertion that since the salesman has taken the trouble to come, the transaction should be completed without further deliberation or consultation by the buyer; to buttress this the salesman can plausibly say that he cannot give a promised 'discount' if he has to come back, or indeed cannot come back at all." (Givens, supra note 22 at Tr. 89.) "The Committee believes that the problem of the door-to-door salesman is based on the high-pressure sales pitch, which is caused by a number of factors. First, the salesman is working on a commission basis. He earns only if he sells. The contacts of the sale are made in the living room where the consumer has no opportunity to do comparative shopping. The Southern California consumer is shy, conscientious, and wants to play the role of a good host. It is difficult for the consumer to throw the salesman out of the door even after he realizes that the sales pitch is fraudulent. The consumer-salesman relationship in the living room is a one shot deal. The salesman knows that he can use a high-pressure sales pitch because he will never see the consumer again; the salesman has no reputation to maintain. Finally, another cause, the high-pressure sales pitch is due to the ineffective ways and means various companies use to control their salesmen. No company knows exactly what the door-to-door salesman is going to say once he enters the privacy of a living room." (Mayor's Consumer Protection Committee of Los Angeles, Calif., R. 599.) "Although high pressure tactics are not limited to peddlers, they are especially effective against a lone housewife trapped in her own home. It is far easier to walk out of a store when faced by an over-zealous salesman than to talk an obstinate peddler into leaving * * *." (Memorandum Brief of State Department of Justice of Wisconsin, R. 650.) "* * * we submit that the door-to-door sales transaction * * * especially in the homes of our clients—is totally different from sales in a store. * * * while both types can appeal to impulse buying, at least when the consumer goes to the store he has made a conscious decision to go shopping. The salesman at his door appeals strictly to the pressures of time and impulse—when the consumer goes to the store, it is at his convenience; the door-to-door salesman often is an intruder into the privacy of the home when he is not wanted. The door-to-door salesman often relies on the one-shot approach." (Benny L. Kass on behalf of the National Legal Aid and Defender Association, Tr. 137–138.)

[42] "A good salesman is highly trained in how to 'make the kill'. He may deliver his sales pitch a hundred times a week; so he knows all the angles.

"The consumer, of course, is a novice and is certainly not on an equal bargaining ground with the experienced salesman. There is an inherent unconscionability about such sales * * *. A consumer * * * told us of his experience with another type of high-pressure tactic, the scare tactic. Frightened by the salesman's story and pictures of small children burning to death in their beds, the consumer purchased an expensive home fire alarm system * * *." (Diane McKaig, Michigan Consumers Council, Tr. 615.)

[43] As to inferior merchandise, remember that merchandise sold door-to-door is very often purchased sight unseen. When the goods are ultimately delivered, it is not uncommon for them to be much less than anticipated—of inferior quality, sometimes even defective.

"A consumer * * * purchased a sewing machine from a door-to-door salesman. Shortly after delivery the machine stopped working. The consumer was unable to obtain the promised warranty service * * *. Because it was an off-brand machine, she had a difficult time finding anyone who would service it.

"Generally speaking, we have found that high quality brand name merchandise is seldom peddled door-to-door, and that the warranty * * * is usually meaningless." (Id. Tr. 617.) "A consumer * * * was told that she was purchasing a well-known brand of cookware. It actually turned out to be a different, lesser-known brand." (Id. Tr. 616.) A consumer wrote, "We have just had a bad experience with the Scholastics Systems, Inc. from whom we purchased a $400 reading program. Now we find it is unsatisfactory and faulty * * * they used deceptive measures in selling the equipment." (R. 343.) Elizabeth McCarthy, a social worker described the sale of a $600 course in motel management to a client living on social security and veterans benefits. The woman had no previous experience and had a severe speech impediment, but signed the contract because of the salesman's assurances of a guaranteed job. (Tr. 675; R. 1650.)

exclusively on the representations of the salesman.[44]

Door-to-door salesmen have often deceived their customers as to the actual cost of the goods or services being sold or the comparative value of these products.[45] Magazine subscription salesmen have been particularly adept at minimizing the cost of their services.[46] The record also shows that salesmen of various types of portrait plans have been successful in misleading consumers as to the actual cost of the plan.[47] Sellers of freezer food plans have been extremely active in door-to-door selling and have been the subject of numerous Commission orders. These reflect the use of misrepresentations of the quality of the food products sold and of the cost of the plan. In the typical case the freezer and food supplies together are represented to cost less than the food products alone, thereby affording substantial savings to those who are fortunate enough to participate in the plan.[48]

Excessive prices for products sold in the home are commonplace, and again it would appear that such pricing practices are facilitated by the nature of the door-to-door sale. Since the sale is being made in the home, the consumer is unable to ascertain the price of similar or substitute products as he could do if he visited several retail establishments.[49]

D. *Other aspects of door-to-door sales*

The nuisance occasioned by the unannounced and uninvited call of a door-to-door salesman has long been recognized and regulated by local authorities.[50] Municipal authorities from several communities reported the annoying tactics of door-to-door salesmen which were strongly objected to in their communities.[51] The chief of police of one com-

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[44] "The door to door selling technique strips from the consumer one of the fundamentals in his role as an informed purchaser, the decision as to when, where, and how he will present himself to the marketplace * * *. In the case of solicitation away from the regular place of business of the seller, that critical element in the consumers arsenal, time is now gone. Gone with it is the chance to reflect, compare, decide, walk away" (Statement, National Consumer Law Center, R. 842). "The salesman is not subject to supervision to the extent that is usual in stores, and, if the sales are on a commission basis, is more likely to make extravagant representations which he, himself, can later deny or which his employer may later dismiss as unauthorized" (Givens, supra Note 22 at Tr. 89).

[45] According to Mrs. Doris E. Behre, Virginia Citizens Consumer Council, Inc., "* * * For instance, many salesmen of cheap, poor quality encyclopedias have various tricks to deceive a customer into believing he is getting a free encyclopedia and that his only cost is a yearbook every year for 10 years. In many instances these * * * end up costing * * * as much as a reputable encycopedia" (Tr. 194). "Ask any housewife if she wants to spend $450 for pots and pans and she'll ask you back whether you are out of your head. But twist it into an organization that allows her to buy everything from diapers to cars wholesale, wear her resistance down and pressure her to the point where she will be relieved to get rid of you and you have a sale" (Heise, supra note 32 at Tr. 737). Robert J. Funk, a consumer wrote, "We had an experience with a young man who claimed to be hunting homes where he could place a 'free' encyclopedia set * * *. All you had to do was buy 10 years of yearbooks * * * at $6.95 per year and (a supplementary service) for 10 years which was worth more than the $350 we were asked to pay. The gist of the argument were as above with us gladly accepting the set and various extras under the pretext that this was truly a special bargain * * *" (R. 581). "* * * An example of an installment sale is the case * * * involving a contract for $1,800 worth of glassware signed by a 17-year-old girl. She never would have considered assuming such a debt had it not been for the high-pressure tactics of the door-to-door salesman who assured her that the cost of her purchase was only a few pennies a month." (Furness, supra note 28 at Tr. 78.) "* * * we bought a sewing machine from a door-to-door salesman. The next day I looked at another advertisement for the same machine that I had filed away and I discovered that we had payed exactly twice what I could have gotten it for from this other company * * *" (Rev. George W. Gerber, R. 546).

[46] "* * * A fast talking salesman can quote figures which will make it sound as if someone is really getting something for nothing. But it sometimes happens that these low, low figures are actually higher than regular subscription rates * * *" (Behre, supra note 45 at Tr. 194). Examples given by consumers included the following: "* * * After the salesgirl had left * * * he realized that $19.50 was too much money for two magazines which he did not want in the first place * * *" (R. 345). "My wife * * * was talked into a contract by a glib salesman into purchasing $127 worth of subscriptions which she could have bought on her own for about $34 * * *" (R. 84).

[47] "My wife signed a contract for some photographs. I * * * found the saleman had not gone over all the details with my wife clearly he failed to mention service charges, interest, etc., however it was written down on the contract" (R. 106–107). Another wrote, "Your salesman represented that each color enlargement of a snapshot would cost $1.88. He did not state that there was a $0.75 mailing and handling charge (a charge which would increase the cost to $2.63 each if submitted separately) * * *" (R. 1824).

[48] Typical Commission cases are: G&M Home Freezer Service, Inc., et al., Docket C–760, 65 F.T.C. 1031 (1964); American Foods, Inc., et al., Docket C–745, 65 F.T.C. 643 (1964). The authorities of the State of Wisconsin became so concerned with respect to the activities of the sellers of these plans that the Department of Agriculture adopted a regulation establishing a 3-day cooling-off period (Tr. 711). See also the Memorandum Brief of State Department of Justice Regarding Cancellation of Freezer Meat and Food Service Plan Contracts (R. 1340–1359). In summarizing the nature of complaints received, it was said that persons gave three reasons: (1) After comparative shopping they realized that the alleged savings under the freezer plan were false or inaccurate; (2) after recovering from the high-pressure sales pitch, often made late in the evening to a captive audience, they realized that the alleged virtues of the plan were unrealistic or misleading * * *; (3) after delivery of part of the merchandise promised under the plan they realized it was defective or misrepresented * * * (R. 1348).

[49] One woman paid $600 for a new roof which she could have purchased for only $250 from a reputable local contractor (R. 573). One consumer in describing the prices charged by door-to-door sellers said, "* * * The bedspreads downtown are $8.95 or $10.95, theirs starting at $29.95 and up. I have a neighbor who bought a set of aluminum ware from a door-to-door salesman. This aluminum ware at the stores downtown was $29.95 * * * she paid $60 * * *" (Tr. 311). A real estate assessor described the prices paid in one area for improvements as "unbelievable" (R. 704). "* * * the objective in an unlawful door-to-door selling scheme, is to extract an overcharge from the consumer. The consumer pays a higher price for the article or service than he would have in a freely functioning marketplace. It is simply a transfer of money from one person to another without any corresponding exchange of value." (Statement, National Consumer Law Center, R. 843.) The Legal Aid Society of Metropolitan Denver reported, "Typically, the item purchased from a door-to-door saleman could be purchased at a considerably lower price in a retail store, while the salesman represents that the opposite is true * * * A few examples * * *: A 'religious organization' sent salesmen into low income areas of Denver to sell sets of Bible story books and religious magazines for prices ranging between $50 and $200 * * * Another * * * sells furniture through a catalog. He represents the furniture to be of the highest quality and durability * * * yet when it is finally delivered it turns out to be of a very low quality, both in appearance and in durability. Typically, the consumer has paid this door-to-door salesman much more for the furniture than he might have paid in a retail establishment for identical or better furniture * * *" (R. 540–541). An investigator in the office of the district attorney of Oregon City, Oreg. wrote, "Invariably the merchandise or service is priced far above competitive market prices and frequently is of inferior quality * * *" (R. 545). Bess Myerson, Commissioner, Department of Consumer Affairs, New York City said, "The Department recently instituted suit against Compact Electra, a company which sells vacuum cleaners costing over $400 door-to-door * * *; No vacuum cleaner sold by any leading department store in New York City costs as much. We have found this frequently to be the case—the goods and services sold door-to-door far exceed in cost similar merchandise available at retail establishments." (R. 1829.)

[50] The business of peddling has been regulated since 1784. Sayerborough v. Phillips, 148 Pa. St. 428 (1892). "From early times, hawkers, peddlers, and petty chapmen, who ply their trade by going from house to house, have been considered as a class for the purpose of legislative control and restriction. Canvassers and solicitors are frequently included in the same class, and no objection to this can be found, where the object of the law is to prevent disturbance or annoyance." Town of Green River v. Burger, 50 Wyo. 52, 58 P2d 456 (1936), Appeal dismissed, 300 U.S. 638 (1937). In Breard v. City of Alexandria, 341 U.S. 622 (1951), the Supreme Court upheld the constitutionality of such an ordinance.

[51] "* * * we are * * * plagued by * * * hit and run mass solicitations. * * * They will obtain a group of 20 or 30 young people and * * * besiege a community en masse for a 2- to 3-day period. (At a hearing I conducted) * * * we introduced into evidence the fact that we had rejected (for licenses) over 16 persons with known criminal records. Some of the crimes were deviant sexual conduct, indecent liberties, confidence games, contributing to the delinquency of minors, burglary, fraud, larceny, pimping, breaking and entering. One salesman had 32 convictions of various offenses * * *. The local school superintendent * * * (found it neces-

munity described numerous complaints from consumers regarding the activities of door-to-door salesmen.[52] In his testimony at the hearing Congressman Fred B. Rooney described the results and information he gained during a 2-year investigation into magazine subscription sales and confirmed the potential danger to the householder in dealing with a door-to-door salesman.[53]

The foregoing testimony as well as other information in the record attests to the fact that the high and middle income consumer is also a prime target for the door-to-door salesman.[54] In recognition of the opportunities offered by the more affluent group, one firm is now marketing a portable charge card imprinter which the salesman can use in the home to charge the purchase price to an existing account.[55]

CHAPTER V. THE PROPOSED RULE

The original proposed Trade Regulation Rule read as follows:

For purposes of this proceeding, the following definitions shall apply:

Door-to-door sale—A sale of consumer goods or services with a purchase price of $10 or more, whether under single or multiple contracts, in which the seller or his representative personally solicits the sale and the buyer's agreement or offer to purchase is made at a place other than the place of business of the seller. The term "door-to-door sale" shall not include any sale made in the presence of the buyer's attorney.

Consumer goods and services—Goods or services purchased primarily for personal, family, or household use, and not for resale or for use or consumption in a trade or business.

Seller—Any person engaged in the door-to-door sale of consumer goods or services.

Place of business—The main or permanent branch office or local address of a seller.

Purchase price—The total price paid or to be paid for the consumer goods or services, including all interest and service charges.

Business day—Any day other than a Saturday, Sunday, or holiday.

Accordingly, the Commission proposes the following Trade Regulation Rule:

In connection with any door-to-door sale, it constitutes an unfair and deceptive act or practice for any seller to:

(a) Fail to furnish each buyer at the time he signs the door-to-door sales contract or otherwise agrees to buy consumer goods or services from the seller a form, entitled "Notice of Cancellation" and designed to be used by the buyer if he elects to cancel the contract or sale, which shall be attached to any contract or other instrument executed by the buyer and easily detachable, and which shall contain in 10 point bold face type of a conspicuous color other than that used for the rest of the contract or other instrument:

(1) The following statement:

Notice to buyer: You may cancel this contract or sale for any reason at any time during the period beginning when you sign the contract or purchase the goods or services and ending three business days thereafter.

If you choose to cancel this contract or sale, you may do so by notifying the seller of your intent to cancel at the seller's business address or telephone number shown on this form any time before 5 p.m. of the third business day following the day you signed the contract or purchased the goods and services. If you choose to notify the seller by mail, the envelope should be postmarked any time before midnight of the third business day following the day you signed the contract or purchased the goods and services.

While any reasonable method of notification which informs the seller of your intent to cancel is permitted, you may wish to notify the seller by one of the following methods:

1. Sign and mail this Notice of Cancellation form, or any other written cancellation notice, to the seller's address shown on this form. If you choose this method of cancellation, it is recommended, but not required, that you send the cancellation notice by certified mail, return receipt requested.

2. Sign and deliver this Notice of Cancellation form, or any other written cancellation notice, to the seller's address shown on this form.

3. Orally inform the seller, in person or by telephone, of your intent to cancel.

If you choose to cancel this contract or sale, you must make available to the seller at the place of delivery any merchandise, in its original condition, delivered to you under this contract or sale, and

(2) A statement that the buyer, if he chooses to cancel, has a right, within 10 business days to a return: (i) Of any payments he made under the contract or sale; (ii) of any goods traded in, in substantially as good condition as when received by the seller; and (iii) of any notes or other evidence of indebtedness given by the buyer under the contract or sale; and that he also has the right to keep any goods or merchandise delivered by the seller under the contract or sale unless picked up at the place of delivery by the seller, at the seller's expense, within 20 business days after cancellation; and

(3) The date the buyer signed the contract or purchased the goods or services; and

(4) The name, address, and telephone number of the seller where he can be notified in the event the buyer chooses to cancel; and

(5) A space for the buyer to sign indicating his election to cancel the contract or sale.

(b) Fail to include in each door-to-door sales contract directly above the space reserved in the contract for the signature of the buyer and in bold face type twice as large as the other type in the contract and of a conspicuous color other than that used for the rest of the contract, the following statement:

You, the buyer, may cancel this sale or contract for any reason at any time up until 3 business days after you signed the contract or purchased the merchandise or services. See the attached notice of cancellation form for details of your cancellation rights and for methods of canceling.

(c) Fail to include in each door-to-door sales contract a clear and conspicuous statement that the seller agrees to arbitrate any dispute arising under the contract at the buyer's option and agrees further to submit to the jurisdiction of the buyer's place of residence.

(d) Include in any door-to-door sales contract any confessions of judgment or waivers of any of the rights to which a

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sary) to write a letter * * * advising parents of the school children in our community that no survey was in fact being taken and that the school district had not approved these particular encyclopedia." (Paul Hamer, village attorney, Wheeling, Ill., Tr. 630–631.) "The village of Wheeling was plagued by a series of vacuum cleaner salesmen prior to this encyclopedia incident. In that particular case this was the referral sales gimmick by which if you purchased a central vacuum cleaner system * * * I think the product was around—cost $900. You paid the $900 and then you gave them a list of some 25 persons. Then, if one of those persons purchased the central vacuum cleaner system you got $25 back on your purchase price * * *. The actual same product could be bought in a retail store for $195." (Id. at Tr. 633.) The village manager of Winnetka, Ill. said, "Our concern in terms of the experience we have relates principally to the magazine salesmen * * * here is the case of a salesman convincing a 12-year-old girl to forge her mother's signature to a check for $101.10 for the purchase of magazines * * * in a case of outright theft * * * the salesman while the housewife had gone to get her checkbook, stole credit cards from the household." (Tr. 658–659.)

[52] "It is not uncommon for us to have a crew of magazine solicitors in the California licensed vehicle with people from * * * numerous States * * *. I have a crew in my community today * * * a solicitor representing himself as a Job Corp worker * * * as being from the Office of Economic Opportunity or that they were from Poverty Appeals Programs * * * people were asked to sign contracts just to prove to the crew managers * * * that the man had * * * called * * * and unknown to the people they were filled out at a later time with high dollar value of purchases * * *. I think the highest was for some $256 * * *. We have had problems with the solicitors having consumed alcohol and becoming rather belligerent * * *" (George P. Graves, Western Springs, Ill., Tr. 662–663). Substantiating documents of these and other incidents are included in the record (R. 1696–1752).

[53] "All too often a knock on the American householder's door is the consumer's introduction to the business world's lowest form of practitioner—the petty thief, the forger, the shyster, the professional con artist, and worse. A survey made by Col. William Durrer, Chief of Police in Fairfax County, Virginia some time ago found that 35 percent of all door-to-door salesmen who worked the county during a 1-year period had police records and that some of these records were three pages long." (Tr. 11.) The Congressman submitted a random sampling of these records which is included in the public record. (R. 758.)

[54] Prof. Egon Guttman of the Washington College of Law, American University said, "* * * there is a need to protect most people in the United States from such predators, be they the wife of a commissioner in one of the U.S. Government agencies buying magazines for her husband * * * or the working man buying his clothes or other necessities from a door-to-door salesman." (Tr. 454.)

[55] Tr. 687.

buyer is entitled, including specifically his right to cancel a door-to-door sale.

(e) Fail to orally inform each buyer, at the time he signs the door-to-door sales contract or purchases the goods or services, of his right to cancel.

(f) Misrepresent, in any manner, the buyer's right to cancel.

(g) Fail to clearly, affirmatively and expressly reveal, at the time the seller initially contacts the buyer or prospective buyer, and before making any other statement or asking the buyer any question, that the purpose of the contract is to effect a sale, stating the goods or services which the seller has to offer.

(h) Fail or refuse to honor any valid notice of cancellation by any buyer and upon such cancellation:

(1) Fail, within 10 business days to return: (i) All payments made under the contract or sale by the canceling buyer prior to his cancellation; (ii) any goods or other property traded in, in substantially as good condition as when received by the seller; and (iii) any note or other evidence of indebtedness given by the buyer in connection with the contract or sale; and

(2) Fail, within 20 business days, to pick up, at the place of delivery and at the seller's expense, any goods or merchandise delivered under the contract or sale.

(i) Negotiate, transfer, sell, or assign any note or other evidence of indebtedness to a finance company or other third party prior to midnight of the fifth business day following the day the contract was signed or the goods or services purchased."

CHAPTER VI. SUPPORT FOR THE RULE

A. *Consumer and government support.* The favorable response of consumers to the proposed rule is demonstrated by the inclusion in the record of many statements urging that the Commission adopt it.[56] Support for the rule also came from government agencies throughout the country as well as from nonofficial consumer groups.[57]

B. *Industry support.* A substantial segment of the direct selling industry supported the proposed rule. Among the members who announced their unqualified support were Encyclopedia Britannica, Inc.[58] Various other industry members endorsed the principle of the rule subject to certain suggested changes.[59] The various changes and amendments they suggested are discussed in subsequent chapters of this statement.

CHAPTER VII. PAST HISTORY OF EFFECTIVENESS OF COOLING-OFF RULES

Inherent in the comments of those who expressed support for the rule was the belief that the rule would be effective, at least to some extent, in alleviating the problems the consumer has had with door-to-door sales. These problems have been grouped for purposes of discussion into five categories: High-pressure sales tactics; misrepresentation as to the quality, price, or characteristics of the product; high prices for low quality merchandise; and the nuisance created by the visit to the home of the uninvited salesman; and the use of deceptive door openers.[60] An examination of the effectiveness of a cooling-off rule with respect to each of these problems should demonstrate whether the proposed remedy is a sound approach to a solution of a substantial number of those problems and whether its adoption by the Commission is justified.

Documentation of the effectiveness of the cooling-off remedy as a solution to many of the problems arising out of door-to-door sales was provided by State officials and others concerned with consumer protection who reported an almost immediate and dramatic drop in the number of consumer complaints following the enactment of cooling-off laws in the various States.[61] These reports prove that the remedy is effective.

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[56] See for example R. 40–47. A logical explanation for this widespread general support may be found in Jolson's study (Note 21, supra), wherein he reports the data he collected showed that 80 percent of all items purchased would not have been purchased in the near future if the salesman had not called and only 13.2 percent of the transactions had been initiated by a consumer responding to a lead in some form (page 108). Fifteen percent of the consumer sample recommended that direct selling be abolished (page 111); "Forty-two percent objected to making a decision on the salesman's first call. Fifty-three percent feel that an unsolicited contact by a direct seller, either by phone or in person, is an invasion of privacy and should be against the law. Seventy-three percent feel that direct selling upsets the consumer's rational purchase-planning process * * * Approximately 50 percent of all consumers have regretted their purchase of a directly sold item and met with substantial resistance in attempting an order cancellation" (page 119). Typical consumer comments were, "Let's quit playing games and realize that much, if not most door-to-door selling is exceedingly deceptive and high pressure from beginning to end. A gimmick is used to get into the house and then a gimmick is used to sell. The seller is the expert and the consumer is the novice and the FTC should assume a greater responsibility for defending the novice (R. 61). "I'm writing in support of the proposal * * * I feel * * * that the presently practiced method of these sales * * * is very unfair to the individual * * *" (R. 586). "Having been victimized on several occasions by high-pressure salesmen, I should like very much to see a trade regulation rule in effect." (R. 71.)

[57] Department of Consumer Affairs of the city of New York (R. 1827); the Consumer Federation of America, whose spokesman said: "* * * CFA wholeheartedly applauds and approves the promulgation of regulations that consciously seek, as do the Commission's * * * to provide an effective, inexpensive remedy to consumers who have been enticed or baited into, or who out of impulse agreed to unneeded purchases from a door-to-door salesman. We believe that the concept of a 'cooling-off period' * * * provides such a remedy." (R. 912–913.) Public Interest Research Group, "* * * the need for regulation along the lines proposed by the Commission is painfully obvious * * *" (Tr. 316); Administrator, Department of Consumer Affairs, State of Oklahoma (R. 712); Executive Director of Consumer Assembly of Greater New York (Tr. 58); Betty Furness, Chairman, New York State Consumer Protection Board who said "* * * The proposed * * * regulations creating a 3-day cooling-off period are essential to protect consumers from the unscrupulous practices of a growing army of unethical door-to-door salesmen" (Tr. 76); National Legal Aid and Defender Association (Tr. 132); the National Consumer Law Center (R. 844); Legal Aid Society of San Joaquin County, Calif. (R. 9); New York State Bar Association (R. 424); Congressman Abner J. Mikva (R. 467); the Legal Aid Bureau of the United Charities of Chicago and the Consumer Protection Committee of the Chicago Council of Lawyers (Tr. 514); Consumers Union (R. 1572); Legal Services Organization of Indianapolis, Inc. (Tr. 813); Onondaga Neighborhood Legal Services, Inc. (R. 1100); Nassau County Law Services Committee (R. 1783); Eugene Oregon Area Chamber of Commerce (R. 328–329); Better Business Bureau of Greater New Haven, Inc. (R. 334); Chairman, Wayne County Legal Aid Association (R. 236); Department of Weights and Measures, Ventura County, Calif. (R. 1753); Deputy City Attorney, Stockton, Calif. (R. 207); District Attorney, Oregon City, Oreg. (R. 545); Prof. William F. Lemke, Loyola University School of Law (Tr. 646); Ohio State Legal Services Association (R. 376); Phyllis R. Snow, Dean, College of Family Life, Utah State University, Logan, Utah (R. 686); Village Attorney, Glenview, Ill. (R. 687); Mrs. Martha Pettus, Shaw Area Welfare Committee and Consumer Unit (Tr. 335); Judge Arthur Dunne, of Illinois (Tr. 596); John B. Martin, Special Assistant to the President for the Aging and Commissioner on Aging, Social Rehabilitation Service, of the Department of Health, Education, and Welfare (R. 1093); John B. Breckinridge, Attorney General, State of Kentucky (R. 304); Urban Law Institute (R. 741); William J. Scott, Attorney General, State of Illinois (Tr. 883); and many others.

[58] "* * * Encyclopedia Britannica has endorsed the Commission's cooling-off proposal * * * (and) * * * is implementing the FTC rule that has been promulgated * * * " (Curtis, supra note 25, at Tr. 48).

[59] Robert W. Frase, vice president, Association of American Publishers, Inc. (Tr. 272); Edward Sard, National Association of Installment Cos., Inc. (Tr. 222–223); Grolier, Inc. (Tr. 398); Council of Better Business Bureaus (Tr. 418); George P. Britt, vice-president and secretary, Health-Mor, Inc. (Tr. 895); Field Enterprises Educational Corp. (Tr. 868).

[60] See notes 34–37, supra.

[61] Walter W. Falck, president of the Maryland Consumers Association, in speaking of the Maryland cooling-off law said, "* * * Since the law became effective * * * on July 1, 1970 (we) have not received a single complaint in regard to the home solicitation sales problem * * * the law has been particularly effective in cases involving the sale of magazines, encyclopedias, fire alarm systems, water softeners, and various home improvements * * *" (R. 624–625). Mrs. Bette Clemens, supra note 39, testified, "* * * our law has been a godsend to Pennsylvania consumers * * * the 2-day cooling-off period has been a most important and useful tool in the protection of the consumer." (Tr. 440.) Mrs. Camille Haney, coordinator for Consumer Affairs, Department of Justice, State of Wisconsin, "* * * we have a 3-day cooling-off period in the area of freezer meat and food service plans. Problems in the food industry have just about been eliminated since it went into effect * * *" (Tr. 506–507). With respect to the effect of Utah's

The effectiveness of the remedy against high-pressure sales tactics is fully supported in the record by statements from both consumers and consumer representatives.[62] Many said that it was the only feasible remedy, as other efforts had been demonstrably unsuccessful.[63]

Those who gave the strongest support for the effectiveness of the remedy clearly recognized that it would not be a panacea for all of the problems associated with door-to-door selling.[64] However, they correctly pointed out that it would be of material assistance in alleviating some of the problems associated with door-to-door selling.

The 3-day cooling-off period will provide the consumer with an opportunity to discuss his purchase with others, to reflect upon the provisions of the contract, and perhaps to do a little comparative shopping. This will give him some opportunity to discover misrepresentations made by the salesman, or to realize either that he is paying too high a price for the product or that he simply didn't know when he agreed to buy what he was being asked to pay.[65]

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adoption of the Uniform Commercial Code cooling-off provision, Mrs. Richard P. Barnes, chairman, Council of Advisors on Consumer Credit said. "* * * it has been my privilege to observe first hand the effects * * *. Many unreputable dealers have left our State, some have gone out of business, others have improved their methods and our consumers are receiving more fair treatment * * *" (R. 573). Mr. Donald Elberson, executive director, Consumer Assembly of Greater New York, reported his investigations had shown a dramatic drop in the number of complaints arising out of door-to-door sales. (Tr. 56.) In speaking favorably of the results of cooling-off legislation, Attorney General William J. Scott, of Illinois expressed the need to improve the Illinois law on the subject (Tr. 889). Senator Moss testified, "In those jurisdictions where door-to-door sales are presently being regulated, abusive practices have been minimized. It is now time that the benefits available to some consumers through such regulation be made available to all * * *" (Tr. 35, 36). An attorney with the Legal Service of Greater Miami, Inc., said that the Florida law was certainly an improvement because it added an additional remedy. (Tr. 542.)

[62] "I would like to be counted as one citizen and consumer who is entirely behind your proposed regulation * * *. By increasing the time available for the consumer to reflect on the product and on the instrument he has signed, many injustices can be prevented." (R. 2.) "The proposed period of time would allow the consumer to think over the purchase and discover any hidden details that the salesman had glossed over. The consumer would also be able to decide for himself if he really wanted the goods or services." (R. 547.) The Legal Assistance Foundation of Champaign County wrote, "The cooling-off period is a proper response to the problem. It is a distinct disadvantage for the consumer to deal with the high pressure after the sale. This is because there is no judicial remedy for the high-pressure sale. The proposed regulation would neutralize the door-to-door salesman's advantage." (R. 1922.) "There is sucker born every minute and he is the one who needs protection from themselves and as well as crooked salesman." (R. 10.) "* * * If this proposal/rule would go through and be approved it would certainly help a lot of people of all walks of life, especially the senior citizen * * *" (R. 35). The Legal Aid Office, Multnomah Bar Association wrote, "Often when a consumer is prodded into buying something he does not want or need in his own home, he comes to his senses within a very short period of time. A 3-day cancellation period would be most helpful to thousands of low-income Oregonians who are pressured into unwise transactions." (R. 684.) "The marketplace is a meeting ground of professional sellers and amateur buyers. It is essential that a more equitable balance be established between the professional and the amateur. The adoption of this rule would be a small step, but at least a step in the right direction in bringing about a little more fairness between buyer and seller in the marketplace. Just recently three coeds came to see me about how cleverly they had been led to sign contracts for over $300 worth of merchandise under a type of door-to-door selling * * * I think it is essential that this rule be made effective." (Stewart Lee, chairman, Department of Economics and Business Administration, Geneva College, R. 605.) In commenting on the rule a management consultant wrote, "I feel that the proposed * * * rule is specifically designed to correct a specific problem * * * that of high pressure salesman obtaining signatures on contracts to purchase * * * (Robert A. Belden, R. 419). In commenting upon the effectiveness of the proposed rule a consumer said, "I suspect such a move would make high-pressure sales tactics sufficiently uneconomical as to encourage a more responsible 'soft sell' by merchants." (R. 50.)

[63] Congressman Mikva said, "It has become increasingly clear that self-regulation within the direct selling industry is inadequate to eliminate misleading and deceptive sales techniques * * * It is equally clear that existing Federal laws fail to provide adequate, easily accessible, and inexpensive remedies to consumers." (R. 468.) Congressman Rooney testified, "Adequate control of consumer abuses cannot result from crackdowns on individual industries in which abuses are rampant. Under pressure, the perpetrators of those abuses merely switch their sales talents to some other product or service. Thus the only answer is to set down some basic regulations for the conduct of all sales in the direct selling field. And the first line of consumer defense is to have the right during a specified period of time to cancel a contract without obligation. The cooling off period proposed by the Commission is a positive response to that need. It allows the consumer to revoke decisions made in haste, often because of pressure, or cajoling, or even intimidation during a confrontation with a salesman." (Tr. 12.) Mr. Alvin Friedman, a banker said, "A distinct advantage of the proposed rule is that the remedy is self-executing. It is readily available to all buyers, regardless of their socio-economic status or level of education. Experience has taught us, especially in the consumer field, the remedies are illusory unless it is automatic." (Tr. 772.) The Legal Aid Service Agency of Columbia, S.C. wrote: "It has not been unusual for our office to be frustrated in remeding the consumer in a door-to-door sale. The immediate finalization of a binding contractual obligation is the problem. The door-to-door salesmen's adept psychological manipulation of the buyer frequently wears off within a short period of time. Complaints * * * result in classification by the seller of the buyer's condition as 'simple buyers remorse'. The new regulation would also give the consumer an opportunity both to prevent deceptive practices that the Commission does not have the manpower to control and to provide an immediate remedy for well recognized abuses of interstate commerce." (R. 416.) The Secretary for the Mayor's Committee on Consumer Protection for the city of Los Angeles said that the following preventive remedies had been tried in the past and proved to be unsuccessful: Better control and training of salesmen; regulation by national associations of direct selling companies; local licensing laws; various consumer education programs (R. 600). The Honorable Daniel T. Prettyman, Associate Judge, the First Judicial Circuit of Maryland wrote, "From over 9 years experience as a County Prosecuting Attorney and for nearly 7 years as a Circuit Court Judge, I can think of no action by the Federal Trade Commission that would be of more effective and substantial benefit to the public than that now proposed for door-to-door salesmen * * *" (R. 240).

[64] Senator Moss pointed out that one of the problem areas not affected by the proposed rule is the situation in which the merchandise is delivered or the service performed after the cooling-off period has lapsed. (Tr. 41.) This was also recognized by the Legal Aid Society of Metropolitan Denver (R. 542). See also Statement by Senator Moss (Tr. 37).

[65] The Legal Assistance Foundation of Champaign County said, "The cooling off period will have a number of effects on the direct selling industry. The right to cancel will encourage comparative shopping. The right to cancel will force the salesman to shift his attention from pressuring the consumer to reach a decision to creating a sale based on quality merchandise at reasonable prices. The * * * period will allow the consumer to reevaluate purchases and prevent financial budgetary problems." (R. 1922.) In its brief, the Wisconsin Department of Justice said, "* * * a cooling off period * * * would alleviate these * * * complaints in several ways. First it would provide a 'decompression' period, which would permit the consumer * * * to recover from the high pressure * * * (it) would also serve to discourage high pressure sales pitches. This would result from the fact that a great number of sales * * * would be canceled * * * In addition, a cooling-off period * * * is consistent with the principle of comparative shopping and provides the buyer with a chance to carefully consider the documents he is required to sign * * * One further reason for supporting the need for a cooling-off period concerns the individual who is intimidated by the salesman. This is the person who is afraid to say no and who purchases the product in order to get the intruder out of his house * * *" (R. 644–645). After pointing out that sometimes consumers agree to a purchase simply because they feel helpless to resist, Mr. M. Paul Smith, president of the District of Columbia City Wide Consumer Council said, "There are also consumers who need assistance from someone other than a salesman to help him to understand the terms of the contract * * *. Your proposal would allow this consumer to consult with someone who could explain to him the details of the contract. Then he could decide whether or not he would like to proceed with the purchase * * *" (Tr. 340). The fear on the part of industry members that the rule would lead to comparative shopping is illustrated by the statement of one who said, "To allow 3 days really gives the consumer a situation whereby he then uses the original salesman, not because he has been misled, but to pressure other Sales Representatives to give him a better deal so that he can thereafter cancel the contract." (Alsar Manufacturers, Inc., R. 1773.)

On the other hand, in the absence of a successful and continuing consumer education program, the effectiveness of the rule upon the operations of the ghetto peddler would be problematical.[66]

Although the rule is envisioned by some as a method of reducing the number of door-to-door salesmen who annoy the householder by discouraging persons from seeking careers as direct salesmen, it is not designed or intended to have that effect even though it might curb some of the more objectionable and perhaps effective sales practices of individual salesmen.[67]

Standing alone, a unilateral right on the part of a consumer to cancel a door-to-door sale probably would not halt the use of deceptive door openers. However, it would be an indirect restraint because industry members would realize that the consumer will have time to reflect upon the means used to gain entrance to his home, and if that means outrages his sensibilities, he will cancel the sale.[68]

CHAPTER VIII. OPPOSITION TO THE RULE

A. Consumer opposition. There was little consumer opposition to the proposed rule. Several printed form petitions signed by individuals were submitted for inclusion in the record.[69] Some consumers objected to the rule on the grounds that it represented an unwarranted intrusion of government into the conduct of their business affairs.[70] Some individuals criticized the proposed rule saying that it would deprive them of a necessary and convenient service.[71] A few statements opposing adoption of the proposed rule without specifying the reasons were also received.[72] Several consumers also voiced one of the primary industry objections to the proposed rule, i.e., that it was discriminatory.[73]

One consumer representative questioned the effectiveness of the proposed rule on the grounds that many poor people would be unaware of their cancellation rights or would not become dissatisfied with the transaction until after the cooling-off period had expired.[74]

B. *Industry opposition.*

The most commonly expressed industry objection to the proposed rule was that it discriminated against sales in the home and left untouched other methods of retailing such as sales in stores and mail orders.[75] Several direct sellers objected to the proposed rule on the grounds that it was unfair to the salesman, cast unjust aspersions on the industry, and was based on the false premise that the consumer is susceptible, weak-kneed, ignorant, and incapable of making a rational decision.[76]

Others complained that the repetitive requirements for advising the consumer of his right to cancel was simply an invitation and encouragement for him to do so.[77] Some said that the consumer would use the rule as an escape hatch to cancel contracts because of changed circumstances and not because he had been high-pressured into buying something he did not want or could not afford.[78] One businessman wrote that the rule would have the effect of destroying the direct sales industry and that the rule was a classic example of over-kill.[79] Another wrote that there were already a sufficient number of laws and regulations on the books to control the activities of the bad merchants and that further controls were not needed.[80] Salesmen, for the most part, based their opposition to the rule on the theory of discrimination.[81]

A substantial number of direct sellers reported that they had already adopted a policy of permitting the consumer to cancel a sale within a stated period of time and that either the rule was unnecessary and should not be adopted or that they should be exempted from its requirements.[82] Some of the larger companies reported that they had used the cooling-off provisions either voluntarily or because of State requirements without any particularly adverse effects.[83]

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[66] The necessity for a consumer education program to support the rule was pointed out by a number of those who testified at the hearing (Tr. 361, 555, 889).

[67] See Note 51, supra.

[68] The fact that the cooling-off right would probably not have too much effect on the use of deceptive door openers is illustrated by the acceptance of the cooling-off principle by many industry members who at the same time objected to a provision in the proposed rule which would require the salesman to state immediately and forthrightly the purpose of the call (see Tr. 158, 159, 187, 188, 227, 228, 434).

[69] R. 114, 209, 258, 1639. These petitions stated in part: "* * * We firmly believe that such a restriction would permanently discourage any further direct selling and deprive us of the convenience we now enjoy in having salesmen come to the house where we can examine and select merchandise in the privacy of our homes, receive the personal attention you can no longer get in a store, and save us the time of a shopping trip. We are adults, quite capable of making a decision as to what we want to buy, and we don't need 3 days to make up our minds, especially at the cost of cutting off the kind of service you cannot get today from a harried salesgirl in a retail store."

[70] One individual wrote: "Government is already too complicated and too costly and already controls too much of the people's lives. Any additional controls can only be a further step toward eliminating the freedom that distinguishes this great society from the many oppressive societies that infest the world today."

* * * * *

"I believe that the average customer is capable of deciding for himself at the time of purchase whether he needs or wants the merchandise offered and, further, that he is capable of judging the quality. It is an insult to his intelligence to think otherwise." (R. 349.)

[71] R. 201, 679, 685.

[72] R. 202, 239, 391, 455, 636.

[73] "Some of the finest products I have purchased have been in my home * * * Deceptive contracts can be written in stores as well as the home and I feel any regulation imposed should apply to store sales as well as home sales." (R. 399–401.)

"In my opinion this rule is unfair and discriminatory and ridiculous unless it is also made to apply to every other person who sells merchandise * * *" (R. 635.) See also R. 685, 688.

[74] Richard F. Halliburton, Legal Aid and Defender Society of Greater Kansas City, Inc. (Tr. 559–560). Fears that a lack of knowledge on the part of consumers would frustrate the effectiveness of the rule were also expressed by Diane McKaig, supra note 42, at Tr. 619–620.

[75] Charles Betz, speaking on behalf of the Water Conditioning Foundation said, "We cannot accept the basic premise that in-home selling is guilty and in-store selling is not."

"We cannot accept the proposition that home solicitation sales should be regulated whereas sales from a business establishment should not be regulated to the same extent." (Tr. 757.) David Yoho, president, Surfa-Shield Institute testified, "The fact is this is class legislation and if, in fact, the recision of a contract represents a better way to do business for the consumer, then I believe the same rule should apply for every product and every service, whether it is sold at the seller's place of business or at the buyer's residence." (Tr. 122.)

"We feel that the imposition of a cooling-off period for door-to-door home solicitation sales is discriminatory and that the proposed rule of the Commission may exceed the authority it has received under the Act simply because the rule does not regulate, but legislates * * *"

* * * * *

"The cooling-off period that the Commission now wishes to prescribe is a further impediment to a traditional sales method of our industry. It hinders the seller and creates no benefit to the purchaser." (Statement, The National Remodelers Association, Inc., R. 1433.)

[76] See letter from the Southwestern Co. (R. 279). Other industry comments to this same effect appear at R. 524, 621, 682. Two local Better Business Bureaus wrote "* * * the rule * * * would * * * unfairly handicap legitimate business; encourage unfair competitive business practices; tend to undermine the fundamental basis of contract between buyer and seller; increase the cost of merchandise and services to the consumer." (R. 186 and 330.)

[77] "Why not give the buyer the right to cancel any purchase within 3 days? What about high pressure automobile, appliance, real estate salesmen and so on? * * * to advertise a 3-day period of cancellability is to immediately invite those who otherwise would not have signed a contract to sign anyway." (Charles Bedinghaus, Continental Associates, Inc., R. 30.)

[78] One merchant said, "* * * I used to operate a direct sales franchise and I would estimate that 97 percent of my customers were satisfied. I would also say that about 60 percent of them would have cancelled because of 'buyers remorse' before they realized the true worth of the product * * *" (Terrance J. Mitchell, R. 48).

[79] P. J. Schick, R. 192.

[80] Letter, Belvedere Furniture Co., R. 233.

[81] See for example letter, Thomas J. Saigh (R. 239); and letter, William E. Huff (R. 244).

[82] R. 257, 332.

[83] Encyclopedia Brittanica said that it was using and would continue to use a 4-day cooling-off period (Tr. 864–865). Mr. Robert Frase, said that he had the impression that compliance with the cooling-off laws of the various States had not had an adverse effect on the business of the members (Tr. 278). Other industry members said that their money-back guarantee was a far more effective and simple remedy. For an exposition of this view see the statement of Avon Products, Inc., R. 849.

The argument that reputable companies permit cancellations within reasonable time limits was also offered to show that these companies would be most adversely affected by the rule since they would comply with it while the more disreputable members of the industry would continue to use the deceptive and unfair practices which was the basis of the rule.[84] While it is true that a substantial amount of door-to-door selling is characterized by high-pressure salesmanship and there seems little likelihood that such tactics will be completely abandoned, it should be emphasized that the principal virtue of the rule is that it gives the consumer an effective weapon of self-help with which to combat those tactics.[85] Moreover, even industry members recognize that compliance with the rule will not unduly curtail the reputable salesman in his business activities.[86]

As for the discrimination argument, it cannot be denied that many retailers use high pressure to make sales in their respective establishments. However, even if it were conceded that retailers generally were guilty of the practices of door-to-door sellers this fact would not justify a failure to act against the latter.[87]

[84] The fact that high-pressure sales tactics and the other practices against which the rule is directed is employed by many reputable companies is thoroughly documented in the record. Congressman Rooney said, "* * * Permit me to remind you the PDS segment of the magazine sales industry was neither a small minority nor a fly-by-night operation. It is represented by some of the largest and most prominent publishing houses in the entire country * * *" (Tr. 10–11). Two salesmen for Brittanica pasted "Special Delivery" stickers over the cooling-off provision in the contract (R. 1496). The fact that this was directly contrary to the company's policy (R. 1888–1889) simply illustrates the difficulty that a direct sales company has in controlling its outside salesmen.

[85] Frederick R. Sherwood said, "* * * we back this treatment * * * it is a low-cost method of consumer protection because it is very much self-administered * * *" (supra note 37 at Tr. 36).

[86] George P. Britt, Health-Mor, Inc. (Tr. 893–895). The view was also expressed that the existence of the remedy would do much to restore the image of the direct selling industry (Professor Buell, supra note 30 at Tr. 835).

[87] In its statement the National Consumer Law Center said concerning the discrimination argument, "To those in the door-to-door selling industry who will say that such a rule is onerous or unfair, we say that they will have no more or less disadvantages than others who compete in the marketplace. That they have been able to sell in their desired manner this long is no justification for allowing them to perpetuate the system.

"The elimination of the unfair advantage of the door-to-door salesman is an idea whose time has come. These salesmen are to learn that the consuming public does not share their philosophy that the art of selling is limited to deceiving or pressuring the buyer into signing a piece of paper. As the consumer becomes more aware of the nature of the

Industry representatives also argue that the effect of the rule will be to increase costs and hinder the recruitment of a sales force.[88] These arguments overlook the fact that in those states which have adopted similar rules there has been no diminution in legitimate selling activity or increased costs resulting from the difficulty of recruiting a sales force.

CHAPTER IX. AUTHORITY OF THE COMMISSION TO PROMULGATE THIS RULE

The argument was made during the course of this proceeding, as has been done in other Trade Regulation Rule proceedings, that the Commission does not have the authority to promulgate Trade Regulation Rules.[89]

In the Statement of Basis and Purpose accompanying the Cigarette Rule, the Commission's trade regulation rulemaking authority was thoroughly discussed; and it was concluded that Trade Regulation Rules are "* * * within the scope of the general grant of rulemaking authority in section 6(g) (of the Federal Trade Commission Act), and authority to promulgate (them) is, in any event, implicit in section 5(a)(6) (of the Act) and in the purpose and design of the Trade Commission Act as a whole." (See Trade Regulation Rule for the Prevention of Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking and Accompanying Statement of Basis and Purpose of Rule, pp. 127–150 and 150.) Nothing developed during the course of this proceeding warrants a change in the view that the Commission has the authority to issue Trade Regulation Rules.

Industry members also questioned the authority of the Commission to issue this specific rule because the remedy exceeds what the Commission may do to eliminate whatever abuses may exist in the direct selling field.[90] However, it is well established that the Commission has wide discretion both in determining what practices are unfair or deceptive[91] as well as in fashioning appropriate ways to eliminate such practices.[92] Moreover, the specific authority of the Commission to require business firms to include a cooling-off provision in their sales contracts has been confirmed as within the scope of the Commission's discretion.[93]

In extending the cooling-off rule to practically all direct sellers, the Commission is persuaded by the record proof that inherent in this method of selling is a potential for high-pressure sales tactics, misrepresentations as to the quality of the goods and services offered, misrepresentations as to the price or characteristics of the products sold, high prices for low quality, and other abuses which often result from the visit of a salesman to a consumer's home. Indeed, the use of such methods is facilitated by the circumstances of in-home sales. The salesman works on a straight commission basis, often unsupervised by his employer while he make the sales presentations; he also has a carefully and scientifically designed sales pitch and the status of quasi-guest in the home. With the exception of the ghetto peddler, it is unlikely that the door-to-door salesman of high ticket merchandise or services will have any further contact with the buyer. This makes the use of high pressure and misrepresentation much less repugnant to him.

As a remedy for the poor bargain, for high-pressure, and for misrepresentations which are promptly discovered, the unilateral right of the buyer to rescind has proven to be a highly effective weapon in those States and municipalities which have adopted a cooling-off statute. The enactment of such laws has been followed by a dramatic reduction in consumer complaints respecting door-to-door sales transactions.

Consumers and consumer representatives, i.e., those who participate in the activities of private organizations aimed at improving consumer protection, as well as State and local officials, approved adoption of the rule. In addition, the

competitive process, the less he will tolerate deviation from its standards." (R. 845.) In Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949) Justice Douglas said, "* * * equal protection (does not require) that all evils of the same genus be eradicated or none at all" (110).

[88] Professor Buell points out, *supra note* 24, at Tr. 834: "* * * Cancellation raises costs of distribution; there is a loss of invested sales time as well as costs to companies, and, in many cases to sales people, in processing canceled orders, returning downpayments, retrieving delivered goods, and returning traded-in merchandise * * *." See also The Direct Selling Industry, supra, note 13, at pages 733–735.

[89] See Statement of the American Retail Federation (R. 609–613); Brief on Behalf of the Direct Selling Association (R. 929–971); Statement of the Water Conditioning Foundation (R. 1404–1426); Views and Arguments of Crowell, Collier, and Macmillan, Inc. (R. 1843–1852) for very thorough presentations of the view that the Commission does not have the authority to promulgate trade regulation rules.

[90] Id.

[91] Federal Trade Commission v. R. F. Keppel & Bros., Inc., 291 U.S. 304 (1934); Max H. Goldberg v. Federal Trade Commission, 283 F. 2d 299 (7th Cir. 1960); Lichtenstein v. Federal Trade Commission, 194 F. 2d 607 (9th Cir. 1952); Cert. den., 344 U.S. 819 (1952); National Trade Publications Service, Inc. v. Federal Trade Commission, 300 F. 2d 790 (8th Cir., 1962); Federal Trade Commission v. Consumer Home Equipment Company, 164 F. 2d 972 (6th Cir. 1947), Cert. den., 331 U.S. 860 (1947); Dorfman v. Federal Trade Commission, 144 F. 2d 737, 739–740 (8th Cir. 1944); Federal Trade Commission v. Holland Furnace Co., 295 F. 2d 302 (7th Cir. 1961).

[92] Jacob Siegel Co. v. Federal Trade Commission, 327 U.S. 608 (1946), 1946–47 Trade Cases Section 57,451. Federal Trade Commission v. Ruberoid Co., 343 U.S. 470 (1952), 1952 Trade Cases Section 67,629. Federal Trade Commission v. National Lead, 352 U.S. 419 (1957), 1957 Trade Cases Section 68,629.

[93] Windsor Distributing Co. v. Federal Trade Commission, 437 F. 2d 443 (3d Cir. 1971).

record indicates that the majority of the direct selling industry has accepted the cooling-off concept. Finally, the record shows that use of a cooling-off provision in door-to-door sales contracts has not been harmful to the members of the industry which have already adopted it whether such action was taken voluntarily or to satisfy the requirements of applicable laws.

In sum, the record in these proceedings provides a firm basis for the conclusion that a trade regulation rule providing for a cooling-off period in door-to-door sales is justified and would be in the public interest as a means of enabling consumers to protect themselves from the tactics widely used by door-to-door salesmen.

CHAPTER X. THE SCOPE OF THE RULE

The record contains many comments about specific provisions of both the proposed rule and the revised proposed rule. Individual consumers and consumer groups suggested adoption of modifications which they believe will make the rule stronger and more effective. Industry members, who accept the cooling-off principle, have recommended changes which they believe will be more equitable from their standpoint and which will lessen the administrative burdens which they foresee would result if the rule were adopted as proposed. These alternatives and proposed modifications will be discussed below.

Following the release of the proposed rule for the receipt of comment, an ad hoc interindustry committee of direct selling companies and interested associations was formed. The principal task of this committee, under the chairmanship of Frederick R. Sherwood, was to formulate an alternative rule which would in their words reflect accurately and responsibly the realities of the direct selling business in order to provide maximum consumer protection with the lowest possible hardship to industry members.[84] The alternative rule was submitted and placed on the public record by Mr. Sherwood together with some explanatory memoranda.[85] The alternative rule will be commented upon later in this Chapter X and in Chapter XI.

A. *Leases and other special transactions.* Several representatives of consumer groups expressed the view that the definition of "door-to-door sale," as well as the definition of "consumer goods and services," be expanded to include leases and rentals.[86] They said that in some States door-to-door sellers were beginning to lease their goods instead of selling them in order to escape the provisions of the State cooling-off legislation.[87] This recommended change has been made in the final rule.

In addition, the word "use" was deleted and the word "purposes" has been inserted in its place in the final rule in order to avoid any connotation that the rule does not apply to goods which are not used or consumed.[88]

The phrase "including courses of instruction or training regardless of the purpose for which they are taken" was also added to this definition in the revised proposed rule and final rule. This addition was made since it is considered essential that there be no question that the rule applies to door-to-door sales of both home study and vocational school training.[89]

B. *Exclusions of sales under $25.* The definition of "door-to-door sale" released with the original proposed rule included sales of consumer goods or services with a purchase price of $10 or more, whether under single or multiple contracts. The phrase "whether under single or multiple contracts" was included in the original rule and in the final rule in order to insure that the rule would apply to transactions in which the seller writes up a number of invoices or contracts none of which show a price of $10 or more, but when taken together the total price exceeds that amount. In other words if the seller sells more than one bill of goods or services to a consumer at substantially the same time, the total price for all will be used to determine the applicability of the rule, even though the seller may prepare separate invoices or contracts for one or more of the goods or services sold.

In the revised proposed rule and in the final rule the exclusionary limit was established at $25. The principal purpose of this limit is to exclude sales by milkmen, laundrymen, and other route salesmen who customarily make sales which would otherwise fall within the scope of the rule.

The difficulty of establishing the exclusionary limit is illustrated by the striking differences among State laws. In three of the cooling-off States, the rule applies only to sales of $25 or more; in one State to sales of $50 or more; and in another to sales of $150 or more.[100]

The Uniform Consumer Credit Code provides only for coverage of "consumer credit sales."[101] The overwhelming majority of the State laws apply only to "installment sales," and some consumer representatives recommended that the proposed rule be amended to conform to such laws.[102]

Congressman Rooney said that the rule should apply to all door-to-door sales regardless of the amount involved, since he had discovered that some 56 percent of magazine subscription sales were valued between $10 and $25, with another 24 percent at less than $10.[103] A majority of industry members advocated exemption of transactions of less than $25.[104] Consumer representatives were not in agreement as to the amount of an exemption. Some said all door-to-door sales should be subject to the rule regardless of the amount;[105] others said the $10 limitation in the proposed rule should be retained.[106] Those who were familiar with the operation of State statutes having a $25 limitation, said that figure had been satisfactory.[107]

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[84] R. 789–794.

[85] Tr. 62–73; R. 787–788; a chart containing a comparison of the provisions of the alternative rule with those of the proposed rule was presented by Mr. Sherwood and is included in the record (R. 795–800).

[86] Benny Kass, Esq., on behalf of the National Legal Aid and Defender Association said, "* * * leasing has become a popular alternative to credit sales as a means of distributing goods to consumers, and certainly merits inclusion in the coverage of this Trade Rule." (Tr. 139.) David Cashdan, Consumer Federation of America. (R. 377.)

[87] Memorandum Submitted by Ohio State Legal Services Association (R. 379).

[88] This suggestion was made by a number of consumer representatives: Christian S. White, Public Interest Research Group, at Tr. 322, Fritsch, supra note 32 at Tr. 526, and Lemke, supra note 57 at Tr. 649.

[89] The United Business Schools Association stated that its members would not be subject to the rule since the courses offered were for the purpose of giving vocational training for use in business (R. 1591–1592). The need for this amendment was also expressed by a consumer representative (Ron Fritsch, supra note 32 at Tr. 525).

[100] R. 1791; S. 1599 applied only to transactions of $60 or more, Note 10, supra, page 4.

[101] The term "consumer credit sale" is defined in section 2.104 of the Code. Subsection (d) provides: "Either the debt is payable in installments or a credit service charge is made * * *."

[102] R. 1791; Mr. Donald Elberson said, "I think the major thrust should be, as far as we have been able to determine in New York, an installment sales contract. I think this is the major source of difficulty at the present time." (Tr. 60.) Miss Betty Furness concurred in this view (Tr. 78–79). Mr. Richard Givens said, "The unfair practices * * * have been concentrated exclusively in credit transactions obtained by solicitors. Cash sales by home solicitors, whether by Girl Scouts canvassing with cookies, or by such firms as Avon which do not use credit contracts or seek to enforce collection from customers, have not generated abuses * * *."

"If the Commission were to restrict the application of the proposed Trade Regulation Rule to credit sales * * * and cash sales of over $100, it would appear that much inconvenience which might be claimed to flow from the Rule as originally proposed could be obviated." (Tr. 97–98.) See also Tr. 176.

[103] Tr. 13–14.

[104] Tr. 66. However, those who anticipated that a few and perhaps a minority of their sales might be subject to the rule because of such a low exemption price advocated that it be increased. Although the average Avon sale was said to be under $10 the company recommended that the exemption be increased to $60 (Tr. 242, 249); Watkins Products said $50–$75 would be more realistic (R. 674); The Southwestern Co., $50 (R. 413); the National Institute of Drycleaning and the American Institute of Laundering, $100 (R. 706).

[105] Behre, supra note 45 at Tr. 166; National Consumers League statement (R. 1065). National Consumer Law Center (R. 2403–2404).

[106] Richard X. Connors, testifying on behalf of the National Consumer Law Center (Tr. 216); Byrne, supra note 31 at Tr. 503.

[107] Mrs. Bette Clemens of Pennsylvania, who said, "It has been our experience * * * that the contracts * * * for magazine sales * * * are over $100 * * * (Tr. 444). Miss Sally Weintraub of Florida said that the $25 limitation had covered most of the sales which had caused them difficulty and added that they were generally concerned with sales in the $150 to $200 range (Tr. 554).

The argument in favor of a $25 or higher limitation is that it would reduce the inconvenience to the seller while still enabling consumers to enjoy the benefits of the cooling-off provision if it is really needed—in cases where they have overextended themselves financially.[108] Support for a $10 or lower exemption is based on the assumption that the poor are particularly in need of protection, and that a $10 sale is just as important to them as a much larger sale is to the more affluent.[109]

In deciding that the $10 exclusion in the proposed rule should be increased to $25, the Commission was persuaded by the fact that a door-to-door salesman could not long survive if his livelihood depended upon the expenditure of very much time and effort to make a sale of under $25. Sales for less than that amount simply would not justify the use of a lengthy high-pressure sales pitch which has been identified as the most prevalent source of complaints regarding door-to-door sales. Virtually all of the examples of the sort of sales which outraged consumers were for amounts substantially in excess of $25.[110]

C. *"In-home" sales by retailers.* The revised proposed rule specifically excluded from the definition of door-to-door sales certain types of transactions. There was no substantial objection to these exclusions although they were the snbject of some comment.

In commenting upon the original proposed rule, industry members suggested an exemption for in-home sales by salesmen from established stores in the community who are invited to visit the home by the consumer as a result of an unsolicited telephone call or an unsolicited written request.[111]

The hazards of such a blanket exemption are illustrated by a description in the record wherein the consumer invited a home-improvement-type salesman to her home after seeing an advertisement for a patio roof at what seemed to be a bargain price, only to learn that it was a bait advertisement.[112] Such an exemption would also exclude the party plan sales, wherein the hostess invited the salesman to a party of her acquaintances.[113] It would open the door for salesmen using all sorts of spuriously obtained invitations.[114] Rather than grant such an exemption, the Commission believes it should be made clear that the rule applies to an ordinary transaction in which the buyer invites a salesman to the home. Therefore, in the revised proposed rule and in the final rule, the words, "whether in response to or following an invitation by the buyer" were added to the definition of "door-to-door sale," following the phrase, "in which the seller or his representative personally solicits the sale."

One exception to the scope of the proposed rule which appears to be worthy of adoption is the one which would exempt sales made in the home pursuant to prior negotiations in the course of a visit by the buyer to a retail business establishment, having a fixed permanent location where the goods are exhibited or the services are offered for sale on a continuing basis. This exception which was included in the revised proposed and final rules would apply if the buyer visited a furniture or carpet store, for example, and after discussing certain merchandise, asked that a salesman be sent to the home to measure or show samples.

While such sales are actually consummated in the home, the attributes of the typical door-to-door sale are not present—the consumer has not been duped or otherwise deceived as to the purpose of the sales call. If such sales are not excluded, it would be necessary for retail stores who do most of their selling on their business premises to devise separate contracts or forms for use on home calls, or alternatively, to require the customer to return to the store to sign the contract.[115]

D. *Overlap with Regulation Z.* In addition to those dealing with sales resulting from previous negotiations in a retail establishment and emergency situations, a provision that the rule will not apply to transactions in which the consumer is accorded the right of recission pursuant to Regulation Z was added in the revised proposed rule. This is to avoid any conflict regarding the form of notice or to impose duplicitous requirements on the seller,[116] and has been retained in the final rule.

E. *Emergency Repairs.* Another exception to the consumer's right of cancellation appears to be necessary where the consumer is in need of emergency repairs, replacement, or service.[117] Some consumer witnesses expressed the fear that such a provision might be improperly used by unscrupulous sellers to avoid the effect of the rule,[118] while others stated that such an exception, if properly restricted, would be appropriate and not inconsistent with the purpose of the rule.[119]

The alternative rule proposed by the ad hoc industry committee contained an emergency exception provision patterned after the one used in Regulation Z.[120] However, as it appeared to the Commission that additional safeguards were required, the revised proposed rule limited the exception to instances in which: (1) The buyer has initiated the contact; and (2) the seller is furnished with a statement in the buyer's handwriting describing the situation requiring an immediate remedy and expressly acknowledging and waiving the right to cancel the sale within 3 business days.

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[108] "I find the $10 limit, in my view, is perhaps too low rather than too high. I am concerned in this respect that the Commission may find a great deal of trivia involved * * *." (Prof. William F. Lemke of the Loyola Law School (Tr. 649).) Mr. Richard Givens testified to much the same effect (Tr. 98).

[109] R. 1065.

[110] See Notes 39, 49 supra.

[111] Miller Stormguard Corp. (R. 15); National Association of Music Merchants (R. 701). "Another less frequent transaction is a sale in the customer's home following a request by the customer to have a salesman bring to the customer's premises samples for demonstration purposes or descriptive literature for information purposes about products, such as washers, dryers, refrigerators, vacuum cleaners, sewing machines, hearing aids, or farm or garden equipment, such as tractors. These transactions also result from the customer's initial contact of the store and request for such a home demonstration or presentation. These demonstrations or presentations are made at the customer's home for the customer's convenience or accommodation, as when a customer is not physically able to visit a store because of age or other infirmity. Again, the transaction may be consummated at the customer's home after the demonstration or presentation without the customer ever visiting a store. As with the installation or custom-fitting transactions, these home demonstration or presentation transactions would be included by the proposed rule.

"The addition of the following new subsection to Note 1(a) is suggested to exclude the above described transactions by established retail store organizations:

"Made pursuant to prior contact initiated by the buyer in a telephone or mail communication in which the buyer requested the seller, who maintains a retail business establishment having a fixed location where the goods are exhibited or the services offered for sale on a continuing basis, to provide an estimate, demonstration, presentation or fitting in the buyer's residence or place of business as an accommodation or convenience to the buyer." (Sears, Roebuck & Co., R. 2127–2128.)

[112] Tr. 99.

[113] Tr. 186.

[114] Mr. Ron Fritsch said, "The most abusive of the door-to-door sales arise in connection with the companies who advertise in the newspapers and over the radio and television for free, no obligation home estimates for such items as draperies, reupholstery, carpeting, slip covers and home repair and remodeling * * *. Any worthwhile door-to-door sales law must apply to these cases. Time after time my clients tell me they sign contracts in their homes only to get rid of the salesman who has become too persistent and overbearing." (Tr. 517.)

[115] This exception is in the Uniform Consumer Credit Code (sec. 2.501) and its inclusion in the rule was strongly recommended by the National Association of Music Merchants (R. 700–701) and the National Retail Furniture Association (R. 402–403).

[116] Givens, supra Note 22 at Tr. 109

[117] The necessity for exceptions to the cooling-off provisions in such circumstances is recognized in sec. 226.9(e) of Federal Reserve Regulation Z and in sec. 2.503(1) of the Uniform Consumer Credit Code. The executive secretary of the National Pest Control Association said that a major portion of the exterminating business results from calls for assistance and service from consumers (Tr. 255). An emergency may arise when the consumer discovers the sudden appearance of insects—she would obviously not want to wait 3 days to obtain service (Tr. 263).

[118] Tr. 343; Tr. 531.

[119] Tr. 108; Tr. 500; Consumers Union also recommended the inclusion of such an exception (R. 1577).

[120] R. 793.

Industry members objected to the requirement that the waiver be in the buyer's handwriting and said that the arrangement was too cumbersome and time consuming and was an unnecessary appendage to a routine transaction.[121] They also correctly pointed out that if the buyer exercised his right of cancellation after the work had been performed the seller would not have any means of recovering the costs entailed in making the repairs or performing the service. Equally compelling were statements to the effect that the repair of a television set or the provision of laundry and dry-cleaning service would hardly be classed as an emergency, yet the buyer would not want to wait 3 days to have such services performed. Sellers, of course, would be reluctant to commence performance unless the cooling-off period had expired.[122] The record does not disclose whether a substantial number of the mentioned service industry members are in commerce and thus subject to the Commission's jurisdiction. However, it would appear that in many areas such businesses would be subjected to the rule. The Commission does not believe, as recommended by some, that the rule should not apply to services at all but only to the sale of goods.[123] Such a limitation would create a wide escape hatch which would no doubt be used by many undeserving industry members to avoid the effect of the rule. Nevertheless, the Commission is of the opinion, as in the case of the legitimate route seller of goods, that the typical service company should be granted the relief it requests. Accordingly, the Commission has formulated the following exclusion to the definition of a door-to-door sale:

"* * * The term 'door-to-door sale' does not include a transaction:

* * * * *

(5) in which the buyer has initiated the contact and specifically requested the seller to visit his home for the purpose of repairing or performing maintenance upon the buyer's *personal* property. If in the course of such a visit, the seller sells the buyer the right to receive additional services or goods other than replacement parts necessarily used in performing the maintenance or in making the repairs, the sale of those additional goods or services would not fall within this exclusion. [Italic supplied.]

The exclusion does not permit the seller to replace a furnace or appliance or to sell the buyer other personal property such as furniture, draperies, or fixtures; without complying with the rule, nor would it apply, for example, to the sale of an annual maintenance or service contract for appliances. The term "personal property" is used in its legal sense to limit application of the exception to property that is not real property, i.e. land, buildings, and the like. Thus this exception may not be used in transactions such as the sale of driveway resurfacing, aluminum siding, roofing materials or treatment, landscaping, repairs to the home, or to other real property.

F. *Telephone transactions.* An exemption of transactions conducted and consummated entirely by mail or by telephone was also in the revised proposed rule and has been retained in the final rule. This exemption is premised on the theory that mail order and telephone sales do not have the attributes of the door-to-door sale and that a consumer should be able to order goods or services by mail or telephone and the seller to deliver or perform the services so ordered without satisfying the notice and other requirements of the rule.[124]

G. *Cancellation after performance.* Concern was expressed about the possibility of cancellation by the buyer after services had been performed or expensive goods delivered. While some suggested, in keeping with the laws of several States, that the buyer should be required to pay a penalty, or pay on the basis of quantum meruit for services already performed,[125] the Commission believes that in non-emergency situations the seller should properly bear the risk of cancellation if he elects to perform before expiration of the cooling-off period.

H. *Sales in places other than the home.* The provision in the definition to the effect that the rule applies to sales made at a place other than the place of business of the seller was the subject of favorable comment by Miss Betty Furness, the Chairman of the New York State Consumer Protection Board, who said that a limitation in the New York statute restricted its applicability to sales in the home and that this had resulted in the invasion by salesmen of factories, shops, and other places.[126]

I. *Sales in the presence of an attorney.* The definition of "door-to-door sale" in the proposed rule also excluded sales made in the presence of the buyer's attorney. This provision was the subject of comment at the hearings with one interested party inquiring why his wife should be denied the benefits of the rule merely because he happened to be a lawyer.[127] This exclusion was found to be unnecessary and has been deleted.

J. *Special orders.* The Direct Selling Association joined several industry members in proposing that sales in which the seller offered the purchaser an unlimited satisfaction or money-back guarantee be excluded.[128] Industry members pointed out that such guarantees provide the consumer with greater protection than the cooling-off rule because they are generally unlimited as to time and the purchase price is refunded even though the product may have been used or consumed.[129]

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[121] "The emergency relief granted under Note 1(a)(3) is not practical in that it presents an almost impossible requirement to get 'a separate dated and signed personal statement in the buyer's handwriting describing the situation requiring immediate remedy and expressly acknowledging and waiving the right to cancel the sale within three business days.' To explain such a requirement to the average customer with a pest problem and guide them through the writing of such a document would increase the cost of the service beyond reason. The response of our industry to this as relief has been to forget it as having any practical application. A preprinted form to be completed by the serviceman as to the nature and necessity of the emergency service could be used practically." (Letter, National Pest Control Association, R. 2283–2284.)

[122] "Should it be determined that this Regulation applies to the television service industry, and necessary changes to make it workable are not made, the net effect upon both the public and the industry would be most costly, as to protect themselves those engaged in the industry would be forced to bring all non-functioning television sets to their shops and do nothing to the sets until the 'Cooling-Off Period' had passed. This, of course, would result in delays, inconvenience and a much greater labor expense to an already overburdened consumer." (Letter, Martin J. Leavitt, R. 2128–2129, 2223.)

[123] "All references to services in the proposed rule should be eliminated. The proposed rule appears to be primarily directed to the sale of goods rather than continuing local oriented service industries such as ours. It is no secret that a poor service businessman is his own worst enemy. His life blood depends on the satisfaction of his customers on a continuing basis. It is for this reason, that examples of consumer abuse (of the kind intended to be eliminated by the proposed rule) are, for all practical purposes, nonexistent in the dry cleaning and laundry industries. It is conceivable that the proposed rule to include service industries would deprive the American consumer of delivery services by the milkman, the bakeryman, the cleaner, the launderer, and even the newspaper boy." (Letter on behalf of the American Institute of Laundering and the National Institute of Drycleaning, Inc., R. 2218.)

[124] The need for this provision was described by Mr. S. Arnold Zimmerman (Tr. 247–248). If this exception were not in the rule the placement of mail or telephone orders would be unduly complicated.

[125] David Cashdan, Consumer Federation of America (Tr. 381).

[126] Tr. 79, R. 345. The need for such a provision is fairly obvious as restriction of the effect of the rule to contracts signed in the home would lead to all sorts of subterfuges to get the consumer out of his home to sign.

[127] Kass, *supra* note 41 at Tr. 140. Suggestions that the provision is unnecessary also appear at Tr. 650, 715, 814; R. 1366.

[128] The Association said: "The Commission should also consider exempting sales that offer a satisfaction or money-back guarantee in a clear and obvious manner. The satisfaction or money-back guarantee is the ultimate in consumer protection and a step beyond the cooling-off rule which should be encouraged by the Commission. One way to accomplish this would be for the Commission to establish wording that would allow a seller to be exempt from the burdens of the cooling-off rule by providing the consumer with a satisfaction or money-back guarantee agreement that met the Commission's specifications." (R. 2228.) For supporting comments see letters from Sears, Roebuck & Co. (R. 2130); Mary Kay Cosmetics, Inc. (R. 2210); Avon Products, Inc. (R. 2212).

[129] "* * * we question the appropriateness of providing the consumer with a remedy which LIMITS his already existing remedy. We refer to those instances where companies are already providing the consumer greater

Adoption of a provision which would exclude from applicability of the rule sellers who provide a money-back guarantee would increase the enforcement problems associated with the rule to a point that the rule would be almost ineffectual. Every direct seller who desired such an exclusion would claim he offered such guarantee. Then the Commission would be confronted with a never-ending problem of determining whether the seller in fact gave such a guarantee and whether he performed his obligations under it. One of the principal advantages of the cooling-off rule is that it is self-enforcing. The consumer is given the unilateral right to cancel the sale. Its effectiveness does not depend upon whether a branch representative or subordinate manager understands the meaning and effect of a guarantee, or even upon his willingness to honor such a guarantee. The record does not contain any information which would indicate that it is impractical for a seller to use a money-back guarantee in addition to the cancellation right afforded by the rule, although two industry members attempted to illustrate the impracticality of such an arrangement.[130] In denying the request for this additional exclusion of certain sellers from the scope of the rule, the Commission recognizes that with respect to some sales an industry member will no longer be able to use the simple sales tickets which now evidence certain transactions and that compliance with the rule will entail some additional expense and inconvenience.[131] Nevertheless, for the reasons stated above the Commission is not persuaded that such an exclusion would be in the public interest or that the record would support it.

K. *Real property, insurance, and securities.* Recommendations were also received that the rule should contain provisions which clearly state that it is not applicable to transactions pertaining to the sale of real property, insurance, and securities. These will be considered in the order presented.

Insofar as the sale of real estate itself is concerned, neither the Commission nor members of the real estate sales industry believe that such sales would be subject to the rule as land would not fall within the scope of the definition of consumer goods or services. However, transactions in which a consumer engaged a real estate broker to sell his home or to rent and manage his residence during a temporary period of absence may fall within the class of transactions to which the rule would apply.[132]

The Investment Company Institute, the National Association of the Mutual Fund Industry, the Association of Mutual Fund Plan Sponsors, Inc., whose members sell contractual or periodic payment plans, the New York Stock Exchange, Inc., and the Securities Industry Association, all expressed a belief that the rule might be interpreted to apply to the sale of securities.[133] They pointed to a provision included in the Consumer Credit Protection Act which exempts "Transactions in securities or commodities accounts by a broker-dealer registered with the Securities and Exchange Commission",[134] and recommended that a similar provision be included in the rule.[135]

The National Association of Insurance Agents, Inc., on behalf of independent casualty insurance agents asked that sales of insurance agents be exempted from the requirements of the rule.[136] In taking this action they duplicated previous requests made by the American Life Convention, the Life Insurance Association of America, the Health Insurance Association of America,[137] and the National Association of Life Underwriters.[138]

The Louisiana Consumers League recommended that the definition of door-to-door sale be expanded to include "financial services such as insurance or investments less than $10,000." [139] The National Consumer Law Center also said that the definition of consumer goods and services should be amended to include expressly the sale of insurance.[140] Neither group gave its reasons for the respective requests.

It is the view of the Commission that the final rule would not apply either to the sale of securities or to insurance. Moreover, the record does not reflect that the sales of these intangibles have been accompanied by the objectionable practices which have characterized the sales in the home of consumer goods and services generally. Nevertheless the record does reflect concern on the part of both consumers and members of the affected industries as to whether the rule applies to these transactions. In order to resolve this uncertainty, the following provision has been added to the definition of "door-to-door sale":

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protection than that afforded by the 3-day cancellation privilege.

"Mary Kay Cosmetics offers its customers the following unconditional guarantee: 'If for any reason you are not completely satisfied with any product, it will be cheerfully exchanged or the full purchase price will be immediately refunded on its return to your Mary Kay beauty consultant or to the company.'

"This guarantee is brought to the attention of the customer by: (1) The beauty consultant reads it to the customers during her beauty show presentation directly from a 'flip-chart' telling the Mary Kay Story; (2) The guarantee is contained on product brochures and literature; (3) The guarantee is printed on the customer's receipt copy, also containing the beauty consultant's name, address, and telephone number, along with addresses of Mary Kay's corporate offices to which products may be returned.

"Please note that this product return privilege is given whether or not the products have been used and without limit as to time; therefore, it gives the consumer much broader protection than that afforded by the proposed rule. The guarantee is always scrupulously honored even though we sometimes received returned containers from unscrupulous consumers who have used all or almost all of the contents before returning the products for refund.

"In light of the proposed rule's applicability to companies which already provide this broader protection, we pose the very practical question—how does such a company comply with this rule in actual practice?" (Mary Kay Cosmetics, Inc., R. 2209.)

[130] "Imagine, if you will, a Mary Kay beauty show at which a lady beauty consultant is saying to the ladies present * * *

'Let's see, your purchase amounts to $22—you're alright. Mrs. Smith, yours is $30.50* (*the cost of the Mary Kay Complete Set, including Glamour Items is $30.50; the Basic Set cost is $18.50)—so, the Federal Trade Commission requires that I give you this notice of cancellation form which you have to return to me within 3 days, but don't pay any attention to that because Mary Kay allows you to return anything you don't like, whether you've used it or not without any time limit—no, you don't have to return it to me in 3 days if you don't like the night cream—I know it says that, and I have to give this form to you, but our company takes it back anytime. Now, Mrs. Jones, your purchase is $26, so I have to give you this Federal Trade Commission thing—but, Mrs. Doe, you can go, since you only bought $10, etc., etc., etc.'" (Mary Kay Cosmetics, Inc., R. 2210; Sears, Roebuck & Co., R. 2129.)

[131] A sample of one of these sales tickets appears at R. 855.

[132] See letter, National Association of Real Estate Boards (R. 2323–2324).

[133] R. 2325–2327, 2332–2334, 2340–2342.

[134] Section 104(2), Consumer Credit Protection Act.

[135] "We believe that as proposed the rule could be interpreted to apply to 'door-to-door sales' (as defined in the proposed rule) of securities by broker-dealers registered with the U.S. Securities and Exchange Commission (whether the securities are listed on a national securities exchange, traded over-the-counter or mutual fund shares). Such a result would not lead to increased consumer protection since securities transactions are already subject to a comprehensive system of Federal regulation. The U.S. Securities and Exchange Commission, the National Association for Securities Dealers, Inc. and the Federal Reserve Board regulate such matters as selling practices, qualification of salesmen, and extension of credit in connection with securities transactions.

"Furthermore, the proposed rule would be inappropriate in the securities area * * *. * * * Thus, a three business day rescission period would in effect give a customer a free 'put' and guarantee him against any loss for that period. Investors would be in a position to speculate free from risk for the period—if at the end of this time the securities increased in value the customer could keep it. But if it declined he could rescind the transaction and receive back his original investment.

"For these reasons, we believe that the rule as finally adopted should contain an exemption for securities transactions similar to that which Congress has included in recent consumer legislation. For example, 15 U.S.C. § 1603 exempts from the provisions of the Consumer Credit Protection Act 'Transactions in securities or commodities accounts by a broker-dealer registered with the Securities and Exchange Commission.' We respectfully suggest that the rule as finally adopted should contain a similar exemption." (Letter, Investment Company Institute, R. 2325–2327.)

[136] R. 2452–2453.

[137] R. 359.

[138] R. 386–388, 1090.

[139] R. 2390.

[140] R. 2405.

"* * * The term 'door-to-door sale' does not include a transaction:

* * * * *

(6) pertaining to the sale or rental of real property, to the sale of insurance, or to the sale of securities or commodities by a broker-dealer registered with the Securities and Exchange Commission.

With regard to the real property provision, it is emphasized that it is not intended to apply to the sale of goods or services such as siding, home improvements, and driveway and roof repairs. The Commission stands ready to reconsider the exemptions respecting the sale of insurance and certain types of real property, e.g., recreational land, should the receipt of additional information or evidence indicate that such action is appropriate.

CHAPTER XI. THE MECHANICS OF THE RULE

A. *Form of notice.* Paragraph (a) of the proposed rule would have required the seller to furnish the buyer with a separate lengthy "Notice of Cancellation" printed in 10 point bold face type in a conspicuous color other than that used for the rest of the contract which described the various rights and obligations of the buyer relative to canceling the contract. Three alternative methods of cancellation were spelled out in this notice.

This provision was widely criticized by industry and consumer representatives because of the length and complexity of the notice and because of the expense entailed in multicolored printing.[141] There was also disagreement as to the placement of the notice. The ad hoc industry committee recommended that it be placed in the contract.[142] Others said that it should be placed on a separate form which would facilitate its use for notice of cancellation.[143]

A separate form for cancellation is provided by New York,[144] and both the notice and form for cancellation are placed on a separate document in transactions falling within the scope of Regulation Z.[145] While some advantage may accrue to the seller if he is permitted to place the notice and information as to the buyer's right to cancel in the contract and it is certain that the buyer would have this information in his possession if he is given a copy of the contract, this alternative has serious disadvantages. First, the longer the contract, the less is the likelihood that the consumer will read and comprehend its provisions. Second, if the consumer uses his copy of the contract to cancel the sale, in the manner suggested by industry members, he would be left without any record of the transaction.[146] Placement of the notice and explanation on a separate form is perhaps more expensive for the seller, and the buyer may not see it or may not even be given a copy of it. However, the latter contingency, if made a practice by a particular seller, would probably be brought to the attention of the Commission and appropriate action could be taken. In short, while an argument can be made on both sides, the record supports the view that use of a separate concise notice, which fully explains the rights of the consumer and tells him specifically how to cancel the contract is preferable and the rule so provides.

The proposed rule did not require the seller to furnish the buyer with a copy of any receipt or contract pertaining to the sale. This was considered to be a serious defect by both consumer and industry representatives.[147] It was also said that it was particularly important that the contract be in the same language as that used in the oral presentation.[148]

B. *Summary notice in the contract.* Paragraph (b) of the proposed rule required the inclusion in a door-to-door sales contract, directly above the place reserved for the buyer's signature and in bold face type, twice as large as the other type in the contract, and in a conspicuous and different color than that used for the rest of the contract, an additional notice in summary form of the buyer's right to cancel within 3 days. This requirement was also strongly criticized on the basis of cost.[149] However, as a safeguard against possible nondelivery of the separate cancellation form, the contract should contain this information.[150]

The provisions respecting conspicuousness and type size might, with respect to some contracts, be inconsistent with the provisions of section 226.6(a) of Regulation Z, which requires conspicuous disclosure of the finance charge and annual percentage rate and the printing of numerical amounts and percentages in figures in not less than the equivalent of 10 point type.[151]

The requirements of Regulation Z and this rule, if applicable to the same contract, might require the summary notice to be printed in 20 point type.[152] Requirements regarding placement of this notice also differ among the State laws.[153]

In view of the foregoing, the revised proposed rule provided that the buyer must be furnished with a fully executed receipt or copy of the contract, which is in the same language as that principally used in the oral sales presentation and that the contract must contain the summary notice printed in bold face type of a minimum size of 10 points and in immediate proximity to the space reserved in the contract for the buyer's signature. If a receipt rather than contract is used, the summary notice must be placed on the front page. If both a contract and receipt are used the summary notice should be placed on the contract. These provisions appear in paragraph (a) of the final rule.

Minor changes have been made in the summary notice in the interest of brevity. In addition, the words "for any reason" have been deleted in order to avoid giving the buyer any indication that he

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[141] "* * * the very people most easily defrauded are those who either cannot or will not read pages of complicated legal material * * *. With this in mind, I must point out that the FTC notice seems somewhat cumbersome" (Furness, supra note 28 at Tr. 81); "Larger type, and rainbow hues will make a more colorful instrument to be sure—at an exorbitant and unnecessary cost. An easily read, succinct notice would seem to be the answer" (Stephen Sheridan, vice president, Electrolux Division, Consolidated Foods Corp., Tr. 157); "* * * the very length of the proposed notice nullifies whatever good would come from separating it from the receipt or the contract" (Brouse, supra note 19 at Tr. 389); "* * * I think that you have done a good job in laying out the things a buyer can do, but it seems to me it is a little too long and would tend to be confusing * * *." (Dan Milan, Director, Bureau of Consumer Protection, Wisconsin Department of Agriculture, Tr. 716.)

[142] R. 790, Tr. 67.

[143] Regarding the form of notice one consumer representative said, "The Notice to the Buyer set forth in the alternative is not a separate or easily detachable document * * * I think this * * * is the most important element of the * * * proposed rule." "* * * these retail installment sales contracts * * * are called bed sheets because the Truth in Lending Act and the Illinois Home Solicitation Law caused so much to be put into them it is unlikely at all that any consumer is going to read * * * the whole contract. Therefore, it is very important, it is essential that the Federal Trade Commission keep its proposed regulation as to the document being separate and easily detachable document." (Fritsch, supra note 32 at Tr. 520–521.)

[144] Tr. 225.

[145] Sec. 226.9(a).

[146] "* * * the copy of the contract or receipt which the buyer receives can itself be used as a cancellation form simply by writing 'I hereby cancel,' signing it and returning it * * *." (Sherwood, supra note 37 at Tr. 67.)

[147] Kass, supra note 41 at (Tr. 143); "Frequently, low-income and unsophisticated consumers have been signing contracts in blank * * * the buyer should be given his copy at the time of the offer and acceptance." (Behre, supra note 45 at Tr. 166.) Mr. Sherwood in speaking of the industry proposed alternative rule said, "One very important improvement in our proposal is the assurance of receiving a written contract or receipt from the seller * * * we specify that the buyer must receive a written statement, a written contract or receipt." (Tr. 71.) This provision is set forth at R. 790.

[148] This requirement was incorporated in the alternative rule (R. 791); "* * * the New York statute provides for notice in Spanish and English in cities with a population over one million. On a national basis * * * FTC regulations should provide for a dual language provision wherever needed." (Furness, supra note 28 at Tr. 81.) "We have many clientele in the legal service program who don't speak English * * *." (Connors, supra note 106 at Tr. 204.) This requirement was also supported by the Cameron County Legal Aid Society which reported the inadvertent purchase of a set of encyclopedias by a Spanish-speaking couple who were told they were signing a cancellation form. (R. 1569–1570.)

[149] Richard F. Goodman, C. H. Stuart & Co., Tr. 184; Ralph Heal, executive secretary, National Pest Control Association, Inc., Tr. 257; Brief, National Association of Trade and Technical Schools, R. 1198.

[150] Fritsch, supra, note 32, at Tr. 522.

[151] R. 404.

[152] R. 180.

[153] Tr. 286–287. A summary description of the requirements of the various States appears in the record at R. 1797–1800.

must have a reason as a prerequisite to the exercise of this right.[154] As for the summary notice it does not appear necessary to prescribe its precise text; thus, the final rule provides that the statement need only be in substantially the prescribed form. Given this degree of flexibility, the seller will be allowed to phrase the summary notice so as to satisfy the specific language requirements of applicable State laws which are intended to provide the buyer with much the same information. Where the language requirements of the State statute contain a statement of the buyer's rights which is inconsistent with this rule (for example, "If you cancel, the seller may keep all or part of your cash down payment"), the seller would, of course, not be able to use the State notice unless the inconsistent language is stricken in sales to which this rule applies.

C. *Method of exercising the cancellation right.* Several paragraphs in the "Notice to Buyer" in the proposed rule contained detailed instructions regarding cancellation procedures and the various methods that the buyer could use. The notice authorized the use of any reasonable method of notification and specifically suggested the use of three—i.e., mailing the notice of cancellation form with the additional suggestion that it be sent by certified mail; delivery of the notice or any other written notice of cancellation to the seller; and oral cancellation by telephone or in person.

Most of the comment received was directed to the provisions concerning oral cancellation. Few of the persons who appeared at the hearings favored this method of cancellation.[155] Both industry and consumer representatives opposed it, primarily because of the obvious difficulty of resolving disputes as to whether the buyer had actually exercised his right of cancellation.[156] Consumer representatives said that the salesmen who frequent the poor neighborhoods would simply disregard oral cancellations and that the method would not be of any real assistance to the poor who were expected to benefit from it.[157] One law enforcement official said that disputes as to whether a sale had in fact been cancelled would pose serious problems for him and further that it would be extremely difficult for a consumer to catch up with a fast-moving sales team in order to effect an oral cancellation.[158] Other comment and testimony in opposition to this provision of the proposed rule emphasized the problems of proof which would arise and that it was not unreasonable to expect a consumer to mail a printed notice, preferably by certified or registered mail.[159]

Based on the information in the record, the objections to permitting oral cancellation are well-founded and the possibility of confusion and uncertainty is sufficiently great to warrant the conclusion that oral cancellation should not be permitted.

The language "any reasonable method of notification" is subject to all of the objections raised above with respect to oral cancellation, with the increased likelihood that even those sellers who desire to comply with both the letter and spirit of the proposed rule may not be informed or may be misled as to the buyer's intention to cancel. Accordingly, this phrase has not been included in the final rule.

Mail, and preferably certified mail, appears to be the best method for the buyer to use in canceling the sale or contract.[160] Regulation Z equates a telegram to mail as a means of giving notice. That is, a telegram filed prior to midnight of the third business day will be effective to cancel the contract in the same manner as a letter mailed at that time. Physical delivery of the written notice by the buyer to the seller's place of business would not seem to be practical in many situations, but there is no objection to authorizing its use.

D. *Identifying the Third "Business Day."* In the revised proposed rule the definition of "business day" was changed in that it listed specifically the nine legal holidays excluded. It also excluded Saturday and Sunday as did the original proposed rule.

Saturday is considered a "business day" in Regulation Z.[161] The majority of the State statutes consider Saturday a business day. Upon reconsideration and in the interests of uniformity, the Commission now believes that Saturday should be considered a business day for the purposes of this rule and the definition has been changed in the final rule to include Saturday as a business day."

The form of notice prescribed in the proposed rule did not require a specific identification of the third "business day." It was suggested that the notice be revised to require the seller to indicate therein the date and day of the week of the third business day. This would enable the consumer to determine easily the termination of the cooling-off period.[162] There is no reason why the seller should not do this in the same manner as he is required to do under section 226.9(b) of Regulation Z.

Accordingly, the form of notice in the revised proposed rule and in the final rule was changed to show both the date of the transaction and the date of termination of the cooling-off period. Moreover, the seller is also required to furnish the buyer with two copies of the notice in order that he may use one to cancel the sale and retain one for his records. A new provision (c) of the revised proposed rule required the seller to complete fully both copies of the notice before giving them to the buyer. This requirement is also in conformity with the aforementioned section of Regulation Z. Despite industry objections to this change [163] the Commission is of the opin-

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[154] This possibility was pointed out by Professor Lemke, supra note 108, who said, "I am wondering whether some buyers may feel they must come up with a good reason for cancelling a contract and thereby through their own inhibitions tend not to cancel or perhaps through the persuasion of an artful seller * * *." (Tr. 650.)

[155] Their support was based on the supposition that the poor and ignorant would rely primarily on this method. "I think it is clear that especially when we are dealing with less sophisticated and more impoverished consumers it is utterly hopeless to suppose that very many of them are going to exercise their right to cancel by * * * putting it in writing and sending it by mail." (Fritsch, supra note 32 at Tr. 519.) Several other consumer representatives who testified to the same effect, included Elizabeth McCarthy a social worker employed by the Hull House Association (Tr. 679); Mrs. Edie Rosenfels of "Call for Action," Radio Station WIND, Chicago (Tr. 811); and Lewis Rosenberg, staff attorney, Legal Services Organization of Indianapolis, Inc. (Tr. 818).

[156] Harold M. Ross, Assistant Secretary of Field Enterprises Educational Corp., inquired, "Does the buyer have a telephone? If he calls the local sales representative who has no responsibility for processing orders, would that be effective? If the fact of his call is unrecorded or denied, does he have a witness?" (Tr. 870.) "A buyer might claim, weeks after the purchase, that he telephoned and canceled the order 2 days after the purchase. Maybe he did—but maybe he did not. Even if he did, there might be no such record with the seller. This could be inadvertent. It could be deliberate. In any event, it is always a problem." (Brief, National Association of Trade and Technical Schools, R. 1200.)

[157] "By far the poorest and least dependable suggested method of cancellation is by telephone * * *." (Clark, supra note 26 at Tr. 349.)

[158] Graves, supra note 52 at Tr. 667–668; Milan, supra, note 141 at Tr. 713–714.

[159] "There is a question as to whether verbal cancellation is really a good idea because it so often is difficult to prove. We have had a number of complaints from people who have tried to cancel contracts directly after purchase and whose cancellations have been ignored * * *." (Furness, supra note 28 at Tr. 79–80.) "* * * to allow an oral cancellation * * * compounds the vulnerability of buyer and seller alike." (Sheridan, supra note 141 at Tr. 157.) "* * * it would be my thought perhaps an oral notice would be more conducive to controversy and have more difficulty of proof than the desirability of including * * * it * * *." (Lemke, supra note 108 at Tr. 651.) See also Tr. 824, 897, and R. 232 wherein similar views were expressed.

[160] Clark, supra note 26 at Tr. 349.

[161] Section 226.9(a).

[162] "* * * we are troubled by section 1(a) * * * which leaves to the consumer the burden of computing 'any time before 5 p.m. of the third business day * * *.' * * * Our suggestion is that the designations for when the period lapses, the time and the date, should be filled in by the salesman." (Cashdan, supra note 96 at Tr. 372.) "* * * I think the potential for disputes concerning the timeliness of notices would be minimized by requiring the seller to fill in a blank in the form, giving the date and day of the week of the third business day following the day of sale." (Christian S. White, Public Interest Research Group, Tr. 323.)

[163] "* * * we agree with the ad hoc Industry Committee that there is no reason why, if the notice explains the meaning of 'business day' to sales representatives and customers alike, any blanks on the notice of cancellation should be filled in by the sales representative except for the company name and place of business which can be printed in advance. Writing in the transaction date (which the buyer already has on his copy of the contract) and the expiration date of the cancellation period become appropriate and necessary only if and when a subsequent decision to cancel is made, a decision not to be assumed in advance. The company would

ion that the seller should bear this burden.

E. *Buyer's obligation to return goods.* The proposed rule provided that the buyer was obligated to make available to the seller at the place of delivery any merchandise "* * * in its *original* condition." (Italic added.) This provision was criticized as being unfair because in the next paragraph of the notice the seller was to be required only to return any goods traded in "* * * in *substantially as good* condition as when received by the seller." (Italic added.)[164]

The ad hoc industry committee would also adopt for both the seller and the buyer the "substantially as good condition" standard.[165] However, it suggested other changes in this portion of the notice. First, it said that the seller should have the option of returning any goods traded in or their value as stated in the agreement.[166] This suggestion was strongly opposed by consumer representatives who said that the goods traded in might be so undervalued in the contract that the purchaser would decide not to cancel for that reason alone, or that the buyer might not be able to pay the price for a replacement.[167]

The ad hoc committee also suggested that if the goods had already been shipped or delivered at the time the cancellation notice is received, the downpayment need not be returned until the goods were picked up or returned (by the buyer) in good condition pursuant to instructions of the seller.[168] This recommendation is objectionable, on two counts: First, because it may encourage the seller to ship or deliver the goods prior to expiration of the cooling-off period; and second, because it imposes upon the buyer the duty of returning the goods. The latter requirement is objectionable because the seller may give him unreasonable instructions regarding the return of the goods or imply that the buyer may have to bear a portion or all of the cost of doing so.[169] If the seller does not desire to run the risk of losing his goods or incur the expense necessary to pick them up, the obvious remedy would be to defer shipment or delivery.

We can conceive of circumstances when the seller may be reluctant to refund the downpayment until the goods are returned because the buyer has made it difficult or impossible for him to repossess the goods or because the goods may have been damaged or used.[170] The rule states it is the obligation of the buyer to make the goods available at the place of delivery in their original condition but provides no remedy to the seller for the buyer's failure to do so. While the rule is silent as to the seller's obligation in such circumstances, clearly the seller would not be charged with a violation of the rule if the buyer does not fulfill his obligations and as a result the seller refuses to cancel the contract.

The possibility of damage or failure on the part of the buyer to make the goods available was recognized by consumer representatives. One proposed remedy was to prohibit the delivery of goods costing over a certain amount until after expiration of the cooling-off period and after time has lapsed for the receipt of a cancellation notice by the seller.[171] Others pointed out that efforts must be made to lessen the period unwanted goods are left in the buyer's possession, and thus reduce the risk of damage or use. They expressed concern about allowing the seller 20 days to pick up the goods because of the "peanut butter and jelly syndrome." If the product is left in the home, the children, by using and looking through the encyclopedia, will, in effect, vitiate the right to cancel because they will soil the goods.[172]

A compromise solution regarding return of the goods was incorporated in the revised proposed rule by the addition of the following provision after the statement of the obligation of the buyer to make the goods available at the place of delivery:

> Or, you may if you wish comply with the instructions of the seller regarding the return shipment of the goods at the seller's expense and risk.

Of course, the seller can avoid this problem entirely by deferring delivery of the goods. In any event the additional option was thought to be advantageous to the seller since it will facilitate recovery of the goods, and it helps the buyer by allowing him to return the goods at the earliest practicable time and thus avoid accidental damage.

Industry strongly objected to this provision; first because it did not instruct the buyer exactly what he had to do to make the goods available and second because the option provision would make it possible for the buyer to mislead the seller as to his willingness to comply with instructions regarding return of the goods until the 20-day period for pickup had expired and the goods became the property of the buyer.[173]

Field Enterprises Educational Corp. said: "Although the Revised Proposed Rule appears to contemplate the kind of practice now utilized by FEEC as mentioned above, i.e., relying on the buyer's reasonable cooperation, the language of the Notice in fact informs the buyer that he need not comply with those requests, however reasonable, makes no mention whatsoever of the fact that the seller

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have no record of what was filled in, and its sales representatives should be neither tempted to alter the cooling-off period nor burdened with an additional liability." (Statement of Field Enterprises Educational Corp., R. 2240.)

[164] This objection was made by several consumer representatives: Jerome Shuman, Professor of Law, Georgetown University, Tr. 171; and White, supra note 162 at Tr. 324.

[165] R. 792.

[166] R. 790. This is in accord with section 2.504(2) of the UCC which provides in pertinent part: "* * * if the seller fails to tender the goods as provided in this section, the buyer may elect to recover an amount equal to the trade-in allowance stated in the agreement."

[167] Fritsch, supra note 32 at Tr. 522; Scott, supra note 61 at Tr. 887. It should be noted that consumer testimony on this provision was limited since the proposed rule did not give the seller the option of returning the value of any goods traded in.

[168] R. 792.

[169] "I have never seen such a one-sided provision attempting to be put into a regulation of law. If you could conceive the instructions being reasonable in all cases, then of course, that could do no harm. But of course, we are talking about unscrupulous sellers whose instructions may provide most anything * * *. I think many of these sellers would try to make the buyer think it would have to be at his expense." (Fritsch, supra note 32 at Tr. 521–522.)

[170] Concern about the possibility of unfair conduct on the part of the buyer was expressed by the industry ad hoc committee "* * * unrealistic to expect all buyers to turn over merchandise or cooperate in its return after downpayment refunded * * *" (R. 797), and by Professor Lemke, "I think there is some possibility of buyer fraud involved in a situation like this * * *." (Tr. 652.)

[171] Cashdan, supra note 96 at Tr. 374, R. 915–916; "I would urge or suggest that perhaps some requirement should be made that the buyer at least make the merchandise * * * reasonably available to the seller for pickup purposes." (Lemke, supra note 108 at Tr. 651–652.)

[172] This thought was best expressed by Mr. Kass who said, "We are concerned that this will place too great a temptation on consumers—especially low-income ones—to use product, thus jeopardizing their right to cancel" (Tr. 141); For statements to the same effect, see Tr. 352, 374, 457.

[173] Encyclopedia Britannica wrote: "There are a number of major difficulties with this statement of the obligations of the parties in the event of cancellation. First, requiring the purchaser to make goods available at the 'place of delivery' could place an unreasonable burden upon him were a seller to make shipments F.O.B. at his warehouse (which would then become the 'place of delivery' as far as the purchaser is concerned). Second, there is no hint of what the purchaser must do to 'make (goods) available' for return. A much more definite statement of the purchaser's obligation is necessary. The only feasible way to deal with this problem is to require the purchaser to comply with the reasonable instructions of the seller as to the return of goods, all at the seller's sole risk and expense. This would also eliminate the option given the purchaser under the present formulation to comply with the seller's instructions concerning return of goods ('if you wish'). The purchaser has signed the contract which he is now permitted to rescind, and he should have a continuing duty to cooperate in returning to the status quo ante.

"The formulation of the fourth paragraph of the Notice also presents particular problems. First, it begins by stating to the purchaser that 'if you do not return the goods to the seller', or they are not picked up within a specified period, he may retain or dispose of them without further obligation. Although certainly not intended, this would appear to give the purchaser the absolute right to retain goods even though he may have failed to comply with the seller's timely instructions for return. Indeed, under the present formulation, since the purchaser has an option to comply with the seller's instructions for return of goods, without being under duty to inform the seller that he will not comply, operation of paragraph four could lead to substantial abuse and loss of valuable goods by a seller without any fault on his part. It must be kept in mind that while the purchaser will be granted a new right under this rule, its purpose is not punitive, and is not intended to require companies to forfeit their goods." (R. 2255–2256.)

will be giving notice of intent to repossess or abandon, and gives the buyer an unlimited right to retain or resell the goods if the seller does not actually physically 'pick them up' in 20 days, a right that appears to exist regardless of what seller and buyer may have said to each other by the end of that period. Thus, FEEC's timely request to a canceling buyer that he return by mail at our expense the cartons he received by mail could under this Proposed Rule be ignored, and the goods resold shortly thereafter before we had any way of knowing whether the customer intended to cooperate; or our request could be answered by the buyer falsely signifying his intention to mail the books back at our expense and then selling them when we did not 'pick them up.'" (R. 2243.)

On this point the ad hoc committee said: "In the Rule as presently worded, the Notice tells the buyer: 'You may, if you wish, comply with the instructions of the seller regarding the return shipment of the goods.' If the buyer decides not to comply, the goods become his if the seller has not picked them up within 20 days of the date of the buyer's notice of cancellation. The 20 days may expire before the goods arrive, so they cannot be picked up within 20 days. Under such circumstances, according to the Rule, they will belong to the buyer without obligation. The seller has 10 business days from receipt of the cancellation notice to tell the buyer that he wants the goods back. The 20 days can easily expire before the buyer even hears from the seller as to whether he would like the buyer to comply with instructions as to return." (R. 2269–2270.)

Under some circumstances it may be unreasonable to allow the seller 20 business days to pick up the goods; on the other hand, if the seller does not have any agents in the locality, such a period of time is not unreasonable. However, under the proposed rule, the buyer would not know until the expiration of 20 days whether the seller desired to have the goods returned. Accordingly, paragraph (i) was added to the final rule to require the seller to notify the buyer within 10 days of receipt of the notice of cancellation if he intends to reclaim the goods or abandon them. In addition this change makes it clear that a failure to pickup the goods is not an unfair trade practice.[174] This has been carried forward in the final rule.

Industry also did not believe that it should be required to refund the downpayment until after it had recaptured the goods [175] and said that withholding the refund was its only weapon available against the unscrupulous buyer.[176] One industry member said that the 10-day refund provision was unreasonable because its experience under its own cooling-off provision had demonstrated that the canceling buyer also stopped payment on any checks given as a downpayment, and that the seller would not ascertain that the check would not be honored before it was required to mail its own refund check.[177] This line of reasoning is apparently based on the assumption that the check will not be put in channels for collection until it is received at a distant main office, and that the cancellation notice will be received immediately after this has occurred. In such circumstances, it would indeed be difficult for the industry member to comply with the rule, unless it established the practice of holding the check sufficiently long to insure that a cancellation notice would not be received. However, it is equally likely that the cancellation notice would be received several days after the check had been placed in channels for collection. In this situation the 10 additional days should be sufficient for the seller to ascertain whether it was safe to make the refund. The record reflects that many transactions do not follow either of these courses for the salesman may cash the check immediately after he gets it. Here again, the seller would have sufficient time to ascertain whether the check was good.[178]

The Commission believes that the rule properly places the burden on industry to adopt procedures which will enable it to make a timely refund in the event it chooses to accept a downpayment. Nothing presented in the record justifies a change in this belief.

In order to put these industry complaints in the proper perspective it should be noted that those members who have operated under cooling-off provisions estimate that the cancellation rate will work out to something on the order of 3 to 5 percent.[179]

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[174] "Since, in effect, the seller must pick up the goods within 20 days or donate them to the buyer, why should failure to pickup the goods be an unfair trade practice?" (Letter, Henry L. Young, Esq., R. 4.)

[175] "A further inequity is caused by the fact that the seller must return any down payment within 10 business days whether or not he gets his goods back from the buyer. This is not fair. In our Alternative Rule submitted March 4, 1971, we included a proviso that where a seller has shipped or delivered goods prior to receipt of a notice of cancellation, or is unable reasonably to stop shipment or delivery upon receipt of a notice of cancellation, and where the seller seeks return of the goods, the seller may defer refund of any down payment until such goods have been picked up or returned. Under such circumstances the seller, according to our Alternative Rule, would have to refund the down payment within 10 business days after the pick-up or return of the goods. We recommend again, in an effort to preserve the equities, the incorporation of this concept to the Notice of Cancellation. Paragraphs 2, 3 and 4 should be re-worded as follows:

"If you cancel, any property traded in and any negotiable instrument executed by you will be returned within 10 business days following receipt by the seller of your cancellation notice, and any security interest arising out of the transaction will be cancelled. Any payments made by you under the contract or sale will be refunded within that time or, if any goods have already been shipped or delivered to you, within 10 business days after they have been returned, in substantially as good condition as when received, pursuant to any reasonable instructions from the seller regarding their return at the seller's expense and risk. If you have not received, within 20 business days of the date of your notice of cancellation, notification by the seller whether he intends within the following 20 business days to repossess and by what method, you may retain or dispose of the goods without any further obligation.

The above change would also require the addition of the following to sec. (g):

"*Provided*, that where a seller has shipped or delivered goods prior to receipt of a notice of cancellation, or is unable reasonably to stop shipment or delivery upon receipt of a notice of cancellation, and where the seller seeks return of the goods, the seller may defer refund of any down payment until such goods have been returned. In such a circumstance, the seller shall refund the down payment within 10 business days after the return of the goods." (Ad Hoc Committee, R. 2270–2271.)

[176] "There is, unfortunately, a small minority of greedy and unprincipled consumers just as there is a small minority of greedy and unprincipled businessmen, but the latter are subject to FTC orders and penalties while the former are not.

"With these two facts in mind, we believe it would be a mistake to notify every prospective buyer who has received delivery, as the Rule now proposes, that he need not return the goods in order to recover his down payment and can in fact sell or retain them if the seller has not picked them up within a short period after the buyer sends off his notice of cancellation, even if the seller has in the meantime asked the buyer to return the goods at the seller's expense. We urge instead the practice long followed at FEEC with the consistent support, cooperation and compliance of our customers—namely, prompt notification to the buyer, after our receipt of his cancellation notice, of our intention to repossess the goods with his reasonable cooperation (mailing them back at our expense), and then prompt repayment to him of his down payment once the goods have been returned." (Statement of Field Enterprises Educational Corp., R. 2241–2242.)

[177] Comments on behalf of Crowell, Collier and Macmillan, Inc., R. 2414.

[178] The 10-day provision was originally suggested by the ad hoc committee, which evidently believed that, except in those instances in which the seller had delivered or shipped goods, such a period of time would be proper (see R. 790).

[179] Publishers Productions, Inc., wrote: "Expensive. Current contracts require an original and a copy of a sales contract. Your proposed procedure requires twice as much paper on every order, which is ultimately paid for by the consumer. 95% who don't cancel paying, of course, for the 5% who are presumably aided." (R. 2316.)

"For these reasons, FEEC (and no doubt all similarly situated sellers of items too costly to forfeit) are required by experience to make a basic choice on all orders received: either (a) delay the shipment of goods to that 97% of our customers who do not cancel for a period long enough to receive the notices of that 3% who do cancel, regardless of where in the country they live; or (b) ship promptly to all customers when orders accompanied by downpayments are received, stopping shipments where possible when a cancellation notice arrives, and notifying those to whom shipment went forward that their downpayments will be returned as soon as our cartons are returned, by their either simply refusing delivery or mailing them back at our expense. In view of its own oft-expressed concern over slow delivery, the FTC should not require us—as the Proposed Rule would—to impose the first route of delay upon the 97% who do not cancel.

"Thus the amendments contained in the new Sherwood submission on behalf of the Ad Hoc Industry Committee are required in the interest of that 97%. These amendments fully protect the buyer against the wrongful retention of his downpayment and against any prolonged uncertainty over how long he must hold on to the goods, but they accomplish this without requiring direct sales companies to hold up shipments in order to protect themselves against fraud." (Statement, Field Enterprises Educational Corp., R. 2244–2245.)

While industry members say that the complexities of the rule impose hardship on the overwhelming majority of their customers who do not cancel to provide protection to the small minority who do exercise the right, they overlook the fact that of this small minority who do cancel, it is probable that an even smaller number would take advantage of the rule to deprive the seller of its goods. It appears to the Commission that industry has overstated its objections and is simply seeking the requested protection in order to permit it to continue to deliver, or to place the goods in channels for delivery before the expiration of the cooling-off period without risk in the hope and belief that the buyer will not be so likely to cancel once he has received the goods.

It was for this reason that the Commission believes that the rule should be worded so as to discourage prompt delivery of the goods even though this might result in some inconvenience to buyers who would not want to cancel and to industry members as well. This same approach was taken by Congress in the District of Columbia Consumer Protection Act.[180] Accordingly, it does not appear that the rule should be changed in the manner suggested by industry members, even though they may encounter some difficulty in regaining possession of the goods within the allotted time. It appears to the staff that the industry member who desires to deliver goods at the risk of the contract being canceled can institute procedures for recovery which are sophisticated enough to avoid the difficulties it foresees. After all, the seller was able to sell the goods in points far removed from its headquarters. There seems to be no reason why it could not arrange to collect the goods through the same agents.

In recognition of the possibility that an unscrupulous consumer might attempt to mislead a seller as to his intention to return the goods until after expiration of the 20-day period allowed for recapture, a minor change has been made in the fourth paragraph of the notice by inserting the words "agree to" in the first line so in the final rule it reads as follows:

> If you do not *agree* to return the goods to the seller or if the seller does not pick them up within 20 days of the date of your notice of cancellation, you may retain or dispose of the goods without any further obligation. (Italics supplied.)

The possibility expressed by Encyclopaedia Britannica that the place of delivery of f.o.b. shipments to the buyer might be considered to the shipping point rather than the buyer's home [181] was dealt with in the District of Columbia Consumer Protection Act by a provision to the effect that the buyer was not obligated to tender the goods at any place other than his residence.[182] E. B. also stated a similar provision could be incorporated in the third paragraph of the proposed "Notice of Cancellation" by deleting the words "the place of delivery" in the phrase, "if you cancel, you must make available to the seller at the place of delivery" and substituting therefor, "your residence." This suggested change has been incorporated in the rule.

F. *Effect of rule on notes of indebtedness.* The proposed rule contained two provisions respecting notes or other evidence of indebtedness given by the buyer in connection with the contract or sale. One of these provisions required the seller to return such documents to the buyer within 10 business days, paragraph (h)(1), and the other, paragraph (i), prohibited the negotiation or other assignment of the financial paper to a third party prior to midnight of the fifth business day following the date of the sale.

Both provisions were the subject of objections by industry members who said that it would require them to increase their capitalization because they could do nothing with the note during the cooling-off period.[183] As a means of avoiding some of the undesirable effects of the provision prohibiting the transfer of paper within 5 days, the ad hoc committee recommended the addition of the phrase, "unless the seller shall have arranged to relieve the buyer of all liability on such note or evidence of indebtedness in the event of timely exercise of the cancellation rights granted under the contract." [184] Another suggestion made was that the seller be allowed to transfer the paper if he refunded the amount necessary to redeem it to the buyer.[185] To impose, as these recommendations suggest, the burden of redeeming the note on the buyer is not justified. The seller should know that if he chooses to negotiate the paper redemption might become necessary and the responsibility should not be shifted to the consumer. Even if the seller has made arrangements to relieve the buyer of any obligation the seller should still answer the responsibility of reacquiring the note if he had negotiated or otherwise assigned the note to a third party.

Consumer representatives urged the addition of language providing that the holder of the note takes it subject to all defenses of any party which would be available in an action under a simple contract. This in effect would abolish the holder-in-due course status of anyone to whom the paper was subsequently sold or assigned.[186]

This suggestion that the seller be required to place an endorsement or other notice on the note preserving the maker's defenses goes beyond the scope of the rule. Such a provision applicable to consumer sales generally is presently under consideration in the form of the proposed trade regulation rule concerning the Preservation of Buyers' Claims and Defenses in Consumer Installment Sales.

To insure protection for the buyer in case the seller had taken a security interest in property other than that being sold, it was recommended that the seller be required to cancel any security interest arising out of the transaction.[187] This recommendation has been adopted.

G. *Confession of judgment provision.* The prohibition against the inclusion in a door-to-door sales contract of a confession of judgment or waiver of any of the buyer's rights was endorsed by consumer representatives.[188] It was said that this provision was essential in those States which still permitted the use of cognovit notes.[189] The ad hoc industry committee also approved of this provision.[190] Some industry members said that the phrase, "waivers of any of the rights to which a buyer is entitled" was vague and might be construed to prohibit the use in the contract of any provisions aimed at protecting the seller. They suggested the addition to the phrase of the words, "under this Rule".[191] This suggestion is valid and the recommended words have been added to the rule. In addition, the words "or receipt" have been added after the word "contract" in recognition of the fact that there may not be a written contract.

H. *Provision prohibiting misrepresentation.* The prohibition in paragraph (f)

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[180] Sec. 3811(i)(3) of Title 28, District of Columbia Code (Supp. V, 1972) provides: "If the seller has performed any services pursuant to a home solicitation sale prior to its cancellation, the seller is entitled to no compensation."

[181] See Note 173, supra, R. 2255.

[182] District of Columbia Code, supra, § 28-3812(i)(1).

[183] Brief, National Association of Trade and Technical Schools, R. 1202; Comment, United Business Schools Association, R. 1600.

[184] Sherwood, supra note 37 at Tr. 69. See also the committee report which stated in pertinent part, "No change in protection afforded buyer; automatic 5-day freeze would harm companies too small to be their own bankers." (R. 797.)

[185] Brief, National Association of Trade and Technical Schools, R. 1203.

[186] Kass, supra note 41 at Tr. 142; Fritsch, supra note 32, R. 1369.

[187] Young, supra note 58 at R. 3. Section 226.9(d) of Regulation Z contains such a provision.

[188] Kass, supra note 41 at Tr. 142; Jerome Shuman, supra note 164 at Tr. 172; Richard F. Halliburton, Attorney, Legal Aid and Defender Society of Greater Kansas City, Inc., Tr. 564. The need for this provision is obvious, as the inclusion of such provisions would frustrate the cancellation privilege given to the buyer.

[189] "While cognovit notes are not being used as extensively as they were before the Wisconsin Legislature made them unavailable for use in garnishment actions, cognovit notes are still used in limited circumstances in Wisconsin." (Joseph F. Preloznik, Director, Wisconsin Judicare Program, Tr. 699.) "Ohio is one of the few States that allows almost unrestricted use of confessions of judgment. This regulation will at least mitigate the use in some door-to-door sales." (Memorandum, Ohio State Legal Services Association, R. 379.)

[190] R. 795.

[191] "Unless this modification is made, however, this section will be susceptible to subjective interpretations which could classify any contract term seeking to protect the seller, regardless of its reasonableness, as a waiver of the buyer's rights." (Comments of the General Electric Corp., R. 367.) See also R. 329.

against misrepresentation of the buyer's right to cancel was generally conceded to be necessary by both industry and consumer representatives.

I. *"Initial contact" provision.* The provision of the proposed rule which attracted the most unfavorable comment from industry representatives and the most favorable comment from consumer representatives was paragraph (g). This required the seller at the time of the initial contact with the buyer and before saying anything else, to inform the buyer that the purpose of the contact was to effect a sale and to identify the goods and services he had to offer. Its purpose was to curb the use of deceptive door openers.

This provision was almost uniformly condemned by industry representatives on the grounds that it placed the salesman in a strait jacket by forcing him to use canned language rather than a normal introduction followed by a disclosure of his identity and the purpose of his call. This group evinced no objection to a requirement that the salesman promptly introduce himself and state his purpose; they said their objection was to the specific language requirement and the abrupt and precipitant nature of the disclosure.[192] Other representatives said that the requirement was neither fair nor practical and would be impossible to enforce.[193]

As a substitute for paragraph (g), the industry ad hoc committee recommended a provision which would prohibit the use of any plan, scheme, or ruse which misrepresents the true status or mission of the salesman in order to gain admission to a home, office, or other establishment for the purpose of making a sale.[194]

Consumer representatives gave strong support for inclusion of this provision in the final rule and said that they considered it to be a necessary and desirable provision.[195]

At the time it released the revised proposed rule for comment, the Commission announced that the door opener provision had been eliminated and that it had taken this action pending development of more information about "door opener" provisions.[196] Insofar as consumers were concerned, this was the feature of the revised proposed rule which attracted the most comment.

The objections of consumers and consumer representatives to the elimination of the door opener can be placed in two broad categories. First are those who object on the grounds that the failure of the salesman to disclose his identity and purpose at the door constitutes a nuisance and wastes the time of the consumer who is not interested in buying anything, much less the merchandise or services which the particular salesman has to offer.[197] Second are those objections that the door opener provision would substantially increase the effectiveness and impact of the rule by lessening the likelihood that the consumer would subject himself to the practiced sales pitch which might result in his making a purchase which was unwanted or unwise.[198]

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[192] "As a matter of fact, some form of identification and statement of purpose * * * is necessary. I just object to setting yourself up within the framework of reference which 4(g) has, before you can open your mouth to say, 'Boy, it is cold.'" (Sheridan, supra note 141 at Tr. 158.) "I object to giving him specific words. As long as he uses no deception, no gimmicks, that would be the way I would treat it. But trying to give him specific words, and then if he misstates one word he is breaking the law * * *." (Richard F. Goodman, supra note 149 at Tr. 187–188.)

[193] See for example, the testimony of Sard, supra note 26 at Tr. 227, 228, 230, Heal, supra note 149 at Tr. 258, 259; and Frase, supra note 59 at Tr. 281, 282. One industry representative said that in many cases such a statement would be untrue because the salesman really didn't know whether he would attempt to sell the prospect anything until he had qualified him as a probable purchaser of the goods or services offered. (Sherwood, supra note 37 at Tr. 434.) This same representative went on to say:

"In my experience as a sales representative, I would say that this would have imposed an impossible handicap on me in going to these homes. I could not have gone to those doors and said I am here to sell you something when I had not the slightest idea whether this was a family of two elderly people, a family with no children, a family that had just bought my product the day before or had bought a competitor's product of perhaps similar quality and size * * *. It would be a tremendous handicap. I would say an impossible one * * *." (Id. at Tr. 437.)

Another representative emphasized the importance of establishing some rapport with the prospect,

"* * * if you tell the person that you are there to sell them a product that they have no reason to think at that time they want, the obvious result is going to be a door close."

In referring to a rather innocuous door opener he said, "* * * I don't call that concealing. That is the first stage of a salesman's approach, he must convince the person that this is something he can use, something that is legitimately valuable in his home. Then he can say—and let's make it clear, I think within a very short time it is obvious why he is there after he gets into the home—but at least it is a method by which the customer can be educated into the use of the product before he says hello, I am here to sell you (an encyclopedia)." (Peter Ward, Esq. on behalf of Grolier, Inc., Tr. 410.)

Harold M. Ross of Field Enterprises Educational Corp. contended that this requirement for an affirmative disclosure would tempt some salesmen to obscure the meaning of those statements by adding others which would be more likely to confuse the prospective buyer than to help him understand the purpose of his visit. (Tr. 873, 874.)

[194] R. 793.

[195] Mrs. Theresa H. Clark of the United Planning Organization in Washington, D.C., after praising the inclusion of paragraph (g) in the proposed rule, said that the prospective buyer who knows the man on the doorstep is a salesman is in a much better position to deal with him (Tr. 351). Other expressions of the need for this provision were made by Givens, supra note 22 at Tr. 100; Kass, supra note 41 at Tr. 146; White, supra note 162 at Tr. 326; Haney, supra note 61 at Tr. 511; McKaig, supra note 42 at Tr. 624; Milan, supra note 141 at Tr. 717; Rosenberg, supra note 155 at Tr. 815; Wilbur C. Leatherberry, Legal Aid Society of Cleveland, Ohio, Tr. 852; and Scott, supra note 61 at Tr. 890.

[196] Federal Trade Commission News Release, Feb. 17, 1972.

[197] Typical of the comments of individual consumers were the following: "I strongly support the current efforts to persuade the FTC to make a ruling requiring door-to-door salesmen to state frankly and openly that their purpose is to sell merchandise or services. The endless parade of peddlers with 'gimmick' lines and 'door openers' constitute a tiresome nuisance that I feel most people would like eliminated. The primary objection most people have to such techniques is that they waste the prospective customer's time. It is very maddening to have from 5 to 30 minutes of one's time taken up by some disguised salesman before one is even given the opportunity to say no * * *. These salesmen certainly have a right to sell their products, but they do not have a right to take up inordinate portions of my time with their devious antics." (R. 1980.)

"I wish to strenuously object to the deletion of the requirement of the so-called door opener provision.

"As a consumer, and a fairly frequent target of door-to-door salesmen, I can think of nothing more annoying, and misleading to the unwary, than the almost universal technique of the salesman representing himself as anything but a salesman. He comes to one's door as a government official, a survey taker, a friendly neighbor, a community representative to 'welcome' one to the community—his (and her) guises are both legion and obnoxious.

"I can see no reason to eliminate this provision * * *." (R. 2026.)

"If you really knew how severely aggravating it is to have to listen to a heart warming story of public service poll taking * * * only to be blasted with the fast curve when the sales pitch gets thrown, you would not have relaxed this rule—you would have tightened it * * *. As a taxpayer I demand that you make them declare their sales intent * * * right from the beginning." (R. 2423.)

[198] In its statement the National Consumer Law Center said:

"We strongly object to the omission of the 'door-opener' provision which was included in the original proposed rule. This provision made it an unfair and deceptive act or practice to fail to '* * * expressly reveal, at the time the seller initially contacts the buyer or prospective buyer and before making any other statement or asking the buyer any question, that the purpose of the contract is to effect a sale, stating the goods or services which the seller has to offer.'

"Omission of this provision will substantially weaken the impact of this rule. Important as the right of cancellation is, it is far better to avoid an unwanted sale in the first instance. A standard sales practice among many door-to-door businesses is to gain entrance to the buyer's home through deception. Typically, the salesman falsely represents that the consumer has won a prize or that he is taking a survey or giving away free merchandise. Once he is inside the door, the customer is at the mercy of the

salesman's high pressure tactics. The consumer often agrees to sign the contract primarily because it is the only available means of getting the salesman out of the house.

"The FTC has recognized the abuses rampant in sales of this kind by proposing a cooling-off period. However, even if persons would take the initiative necessary to cancel under the proposed rule, they still will have suffered the aggravation, inconvenience and invasion of privacy which results when the salesman enters the house under false pretenses. By reinstating the 'door-opener' provision, the Commission will be merely requiring the salesman to be honest. In addition, the salesman's posture will be more equivalent to that of the salesman in a store. The benefit to the buyer will be the opportunity to tell the salesman before he gets into the house: 'I don't want any.'" (R. 2401–2402.)

Donna L. Deaner, Director, Allegheny County Bureau of Consumer Protection stated in her letter: "We question the deletion of the 'door-opener' provision to require salesmen to identify themselves and their product immediately. Typical comments filed here are:

" 'I thought he was from the Veterans Administration. An hour later I found out that he was selling cemetery lots.'

" 'The young man said he was taking a survey. He said he wasn't selling anything, but he finally tried to sell me subscriptions.'

" 'He said he was from the gas company to inspect my furnace. Then he tried to sell me a new one.'

"Without the 'door-opener' provision, a commonly used deceptive practice is left unregulated. Consumers shopping for goods and services in the marketplace know that they are in a position to be sold. In dealing with salesmen at the door, a consumer has the right to also know his position. Since door-to-door sales transactions are usually riskier ventures than other methods of buying, the consumer needs more protection and information to make rational economic choices in this situation." (R. 2426–2427.)

Mr. Robert Porterfield, Coordinator, Consumer Protection Office in the Seattle mayor's office reported that a recent study of door-to-door magazine solicitors had disclosed the use of a number of deceptive door openers including: "* * * the standard line of earning points for competition in anything ranging from trips to Europe to college scholarships." (R. 2432.)

The attorney general of Wisconsin wrote: "We simply want to take this opportunity to express our displeasure with the elimination of the 'door-opener' provision. It is our feeling that such a provision would be of great value in equalizing to some extent the relative positions of the salesman and the consumer during the bargaining process. It is simply one step toward disclosing to the consumer all of the information which should be available to him when he is contemplating an investment. Although it is true that this provision places an affirmative burden upon the seller, it is our position that the burden is a small one compared to the possible benefits." (R. 2435.)

Similar objections were voiced by the Chicago Area Consumer Advisory Board to the Federal Trade Commission (R. 2465), and by Martha L. Dinerstein of the New York State Consumer Protection Board (R. 2429).

The Opinion Research Corp. objected to elimination of the door-opener provision on other grounds. They said this action would once again open the way for salesmen to represent themselves at the door as being engaged in survey research rather than in the sale of products or services. It added that this was not only unfair and deceptive but also caused considerable difficulty to those actually engaged in legitimate survey work.[199]

The Direct Selling Association also expressed the need for a general door-opener provision in the rule which would prohibit deception at the door. It rejected as inadequate a narrow requirement for the mechanical recitation of specific words in the manner provided in the proposed rule,[200] and reiterated the alternative proposed by the ad hoc committee that the Commission include in the rule a prohibition of the use of any plan or ruse to gain admission to a prospective buyer's home or to disguise the purpose of any call at the door.[201]

Despite the record support for the establishment of a requirement for salesmen to disclose their identity and purpose when they first appear on the doorstep, and while there is certainly no reason to condone the employment of the described ruses and various forms of deceit used by door-to-door salesmen to gain entrance into the home, the Commission views the cooling-off rule as intended to give the consumer a self-executing defense against high-pressure salesmanship by enabling him to cancel a purchase which, upon reflection, he believes to be unwise. In keeping with this premise it is believed that the rule should contain only those provisions which are necessary to make it effective. It should not be treated or used as a piecemeal effort to correct a few of the more flagrantly objectionable practices of direct sellers. If additional regulation of this industry is necessary, the Commission will address itself to the problem of identifying the commonly used illegal practices and devise measures necessary to eliminate them. Such practices might include, in addition to deception at the door, misrepresentations as to the quality and nature of the consumer goods and services sold, deceptive pricing, and misuse of the word "free".

Although the Commission has determined that a door-opener provision should not be included in the rule, direct sellers should note that door-opener provisions are appearing with increasing frequency in proposed orders against door-to-door sellers, and that these may be more stringent than the provisions included in the proposed rule.[202]

J. *Arbitration clause.* In paragraph (c) of the proposed rule, the seller is required to include in every door-to-door sales contract a provision whereby he agrees to arbitrate any dispute arising under the contract at the buyer's option and also to submit to the jurisdiction of the buyer's place of resident. This proposal that the seller agree to submit to arbitration at the option of the buyer was enthusiastically received by some consumer representatives who said that it would provide the consumer with a means of avoiding the large costs inherent in legal proceedings.[203]

Mr. Robert Coulson, executive vice-president of the American Arbitration Association, said that the arbitration provision in the proposed rule was incomplete since it did not require the seller to include an enforceable arbitration provision in the contract. An agreement to arbitrate, standing alone, forces the moving party into court to obtain an order directing arbitration. He suggested, therefore, that the rule be amended to require the designation of an impartial agency, such as the American Arbitration Assoication as arbitrator. This would require the dissatisfied buyer only to file with the local regional office "an intention to arbitrate." He expected that the minimum filing fee of $50 could be drastically reduced if an appreciable number of cases involving small amounts of money were filed.[204]

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[199] R. 2413.
[200] R. 2227.
[201] R. 793.

[202] See for example, *Time Inc., et al.*, Docket C–1919; *Subscription Bureau Ltd., et al.*, Docket C–2150.
[203] Kass, supra note 41 at Tr. 143; White, supra note 162, at Tr. 325, 334, 335.
[204] Tr. 784–785.

Mr. Coulson advised that the procedure might also be used to resolve disputes which arise out of a cancellation by the buyer, such as the condition of the goods returned and whether he had made them available for pickup by the seller.[205] Mr. Coulson believed the Association could find and make available arbitrators who would be able to understand the legal nuances of the door-to-door sales transaction. He cited the fact that the Association's initial efforts in bringing arbitration to the consumer had been successful. By way of illustration he pointed to the widespread use of arbitration in automobile accident cases involving uninsured motorist coverage, domestic relations cases, rug cleaning contracts in New York City, and various disputes in the black communities of Philadelphia and Washington.[206] Mr. Coulson also said that while attorneys were used in 95 percent of the commercial arbitration cases where the issues were relatively complex, he saw no need for the use of attorneys on the part of consumers who were capable of representing themselves adequately.[207] In response to a question as to how long it would take to establish procedures necessary to provide arbitration in door-to-door sales transactions, Mr. Coulson said the Association could go to work immediately.[208]

Contrary to the picture painted by Mr. Coulson, the record reflects some misunderstanding of the nature of arbitration,[209] and doubt as to whether the consumer would understand it and be able to make effective use of the procedure particularly if he sought to do so without an attorney.[210] In addition, there is the problem of costs. The Chairman of the Advisory Council for Chicago of the American Arbitration Association said it would be impossible for the Association to handle and provide arbitrators for a substantial number of cases without receiving some sort of minimum charge.[211]

[205] Tr. 786.

[206] Tr. 789–791.

[207] Tr. 793.

[208] Tr. 794.

[209] Some consumer representatives thought that it was a completely informal procedure: "* * * the attorney * * * arbitrated both between my client and the seller for what seemed to be reasonable settlement." (McCarthy, supra note 155 at Tr. 680.) "As to the paragraph on arbitration I would have this question: Does this preclude the buyer from bringing a law suit for damages. In other words, is this an estoppel so to speak?" (Milan, supra note 141 at Tr. 716.)

[210] "I think that maybe more protection can be accorded to unsophisticated buyers and low-income consumers if this paragraph were left out, because I think that the arbitration in this context can put the unsophisticated consumer in an environment where he may feel intimidated." (Shuman, supra note 164 at Tr. 171–172.) "The consumer who can afford no lawyer or supporting witness will still feel at a disadvantage in an arbitration proceeding against a company which has both." (Ross, supra note 156 at Tr. 880.) Mr. Kass, supra note 41 at Tr. 150 and Mr. Halliburton supra note 188 at Tr. 566 also expressed doubt as to the practicability of the provision.

[211] Harry D. Green, Tr. 596.

The Chairman of the Committee on Arbitration of the Federal Bar Association, while praising the provision for arbitration in the proposed rule, also indicated that it would be unfair to expect a permanent arrangement whereby individual arbitrators would serve without fee. He thought that arrangements could be made to minimize these costs if a central place and scheduled times could be made available for this purpose.[212] It was also suggested that if the seller were required to pay the costs of arbitration regardless of the outcome he could spread these costs among all consumers by raising the price of his product or services.[213]

The record in the proceeding has established that consumers are frequently misled by door-to-door salesmen with respect to the nature of the goods and services being sold and as to the terms of the sale. Granting them the right to seek arbitration as a means of redress might in many instances be of benefit to them. Resort to arbitration, however, would not be a panacea; it would still require some initiative on the part of the buyer to invoke this process and competent presentation of the buyer's case if a favorable decision is to be expected. The record does not indicate that a buyer would be more likely to resort to the arbitration process than he would to small claims courts, or that he would be more successful in the former forum than in the latter.

The possibility of using arbitration to resolve issues between consumers and those from whom they buy is worthy of serious exploration and study. However, an attempt to adopt such a procedure before the plans for its use have been formulated, the necessary administrative support provided, and the costs ascertained is certain to fail. In view of these considerations the rule does not contain the arbitration provision.

The second requirement in this paragraph that the seller submit to the jurisdiction of the buyer's place of residence was not the subject of very much comment. Perhaps this was because under normal circumstances the long-arm statutes of most States would result in the seller being subject to the jurisdiction of the courts of the State in which the contract or the sale was made.[214] Although this provision of the proposed rule was approved by consumer representatives,[215] it was not the subject of comprehensive comment in which the various procedural complexities which might arise were considered or addressed. Suffice it to say, in those States which do not have long-arm statutes, procedural devices to make the provision effective would have to be included in the rule.[216] It should also be remembered that as was the case with respect to arbitration, a lack of data and more specific information would make the inclusion of such a provision in the final rule premature at this time. For these reasons this provision was omitted from both the revised proposed rule and the final rule.

[212] David Shipman, Tr. 734.

[213] Joan E. Gestrin, a student at the Northwestern University School of Law, Tr. 577.

[214] "The proposed requirement that the seller must submit to the buyer's jurisdiction is in most States a foregone conclusion under normal circumstances * * * because of the * * * long-arm statutes. We believe it is unwise to attempt to codify in Federal agency regulatory proceedings * * * State law, or court interpretations thereof * * *." (Letter, National Retail Merchants Association, R. 1331.)

[215] Shuman, supra note 164 at Tr. 172.

K. *Lengthening the cooling-off period.* There were many suggestions that the length of the cooling-off period established in the proposed rule was too short. The most common suggestion was that the cancellation period be extended to 5 days, in order to permit the consumer more time to gather information respecting the wisdom of the purchase, to allow for the possible absence of the husband on a business trip, or for consultation with a more knowledgeable member of the family or friend who did not live in the home.[217] It is undeniable that a longer cooling-off period would be of benefit to the buyer. However, sellers must be able to operate their businesses with some degree of certainty; and in the light of the adoption of the 3-day period by 19 of the States and in the Uniform Consumer Credit Code, the record does not justify the extension of the period.

Another suggestion was that the period should not begin to run until after the goods or a substantial part of them had been delivered or the services performed.[218] This would permit the consumer to determine whether there had been any misrepresentation with respect to the nature, quality, or other characteristics of the goods or services. While misrepresentation of the characteristics of the merchandise or service can be detected only after delivery or performance, an extension of the cooling-off period to insure detection of misrepresentation by the buyer would introduce an intolerable degree of uncertainty into the finality of

[216] "* * * neither the fact of that inchoate jurisdiction nor the provision of a contract can make an absent party subject to the personal jurisdiction of a court without implementing procedural devices * * *." (Views and Argument of Crowell, Collier and Macmillan, Inc., R. 1861.)

[217] In urging the adoption of a 5-day cooling-off period Senator Moss said, "But, it seems to me there are three interests which have to be balanced * * * one is the buyer's interest in rescinding undesirable purchases and, second, the legitimate businessman's interest in finalizing a financed sale and the buyer's interest in receiving goods which he still wants and which he ordered." (Tr. 32.) Donald Elberson, executive director Consumer Assembly of Greater New York agreed, "We are also concerned wtih the 3-day period thinking it too short for the consumer to gather information for real decisionmaking" (Tr. 58); as did Mrs. Theresa Clark, a spokesman for the United Planning Organization, "A 5-day cooling-off period would be more desirable." (Tr. 348.) See also Tr. 635–636.

[218] "In many cases he doesn't know what a rotten deal he has got until he actually

the transaction. It can be argued, of course, that any cooling-off period which delays the finality of a door-to-door sale presents bookkeeping problems for sellers. If the goods are delivered a day or two after the contract is signed, the extension of the cooling-off period would not appear to be a significant added burden. However, there may be direct sellers who, by the nature of their business, may not be able to deliver goods sold door-to-door for a month or more and indeed some contracts may envision partial deliveries, or the performance of services over an extended period of time. A provision extending the cooling-off period until after delivery of the goods may have a severe impact on them. In short, while such a provision would be of obvious benefit to consumers in some transactions involving unscrupulous sellers, the probability and degree of disruption of industry transactions, and the legal complexities which might arise, appear to be of such a magnitude that adoption of the provision is not warranted.

L. *The proposal for affirmative approval.* A spokesman for the National Consumer Law Center of Boston College Law School recommended the proposed rule be changed to provide that a door-to-door sale would not be final and binding upon the buyer until he had affirmed his desire to purchase by mailing a notice to that effect to the seller.[219] He pointed out that in many transactions in which the buyer signifies his acceptance by signing a contract, the contract is not legally binding because the seller has executed it subject to approval in order to give him time to make a credit check on the buyer. He said that because of this, as well as because the buyer in the home is at such an obvious disadvantage that his ability to make a knowing and conscious choice is seriously impaired, no violence would be done to the accepted principles of contract law.[220] This proposal was supported by a number of consumer representatives.[221]

The requirement for affirmative approval rather than affirmative cancellation would lessen the likelihood of the consumers making an unwise purchase from a door-to-door salesman. On the other hand industry representatives said that such a provision would inject a large element of uncertainty, delay, and confusion into the transaction.[222] Until it is proven that the more moderate relief of a cooling-off period is ineffective, we have concluded that this extension of the proposed rule is not justified.

M. *Proposal for penalizing seller for noncompliance.* In its comments on the revised proposed rule, the National Consumer Law Center recommended an amendment to the rule which would provide that the cooling-off period would not commence until the consumer had been given the required notice.[223]

While this proposal has merit, it should be remembered that this is a trade regulation rule and not a statute. The failure to deliver the required notices at the specified time would constitute a violation of the rule. The incorporation of a remedy or punishment in the rule for a prospective violation does not appear either appropriate or necessary. To make the requested amendment would have the effect of telling the seller that if you don't comply with the rule now you may have to do so at a later time and under more onerous circumstances. This could lead logically to not one but two violations of the rule, i.e., one for failing to give the notice at the proper time, and two for failing to accord the right of cancellation for 3 days following the actual giving of the notice. In any event enforcement of the rule would depend upon the corrective processes available to the Commission and the fashioning of an appropriate order to insure that future violations did not occur. It would appear that an extension of the cooling-off period in the manner suggested might well be placed in the order against one who had violated the rule. The necessity for including such an anticipatory remedial provision in the rule is not established in the record.

N. *Preemption of State law.* In support of its view that the rule promulgated by the Commission should occupy the field and make it unnecessary for the direct seller to comply with State laws, the industry ad hoc committee proposed in paragraph 4 of its alternative rule the following provision:

> 4. Preemption:
> This Trade Regulation Rule shall supersede any provision of law, regulation, or ordinance of the States and political subdivisions thereof which differs from the provisions hereof.[224]

The reasons for the very serious concern of industry members about the preemptive effect of the trade regulation rule were set forth by Ira Millstein, Esq., who spoke on behalf of the Association of American Publishers, Inc.[225] This concern is based upon the difficulty of complying with the differing provisions of State cooling-off laws and of the expected problems of determining whether compliance with the rule in transactions to which it is thought applicable would make it unnecessary to comply with a conflicting or different State law.[226]

In a separate memorandum submitted on behalf of the Association of American Publishers,[227] a comparison of the 25 State statutes regulating door-to-door or home solicitation sales is set forth. It was accompanied by an outline showing the provisions of State laws with respect to:

1. Time within which the buyer may cancel.
2. The type of sales covered.
3. The notice of rights and format.
4. Method of cancellation.
5. Return of payment provisions.
6. Penalty or service charge for cancellation.
7. Procedure for the return of the seller's goods.
8. Cost of returning sellers' goods.
9. Sellers' obligations respecting traded-in goods.
10. Forfeiture of sellers' goods.
11. Exempted transactions.

The memorandum and outline show striking differences and inconsistencies in the State laws, ranging from the length of cooling-off periods to the types of sales covered and methods of cancellation. The differences are so great that it is doubtful, except perhaps in the States which have adopted the Uniform Consumer Credit Code, whether a contract or procedure used in one State could be used in another. Additionally,

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receives the goods and sees exactly what it is he has purchased. This is especially true in the case of services where the services are never rendered or rendered in a very very slipshod manner." (Fritsch, supra note 32 at Tr. 526.) Senator Moss said, "Finally, let me touch on a problem area that is not at all affected by the current proposal. It is the door-to-door sales order where the contract is signed, but the merchandise delivered at a later date. By then the cooling-off period may have run out. If the merchandise is defective, if it doesn't measure up to the salesman's claims, or if it is unsatisfactory in any other way, the consumer is no longer protected. If the debt has been assigned to a finance company, the holder in due course doctrine will prevent the customer from any effective remedy. Fortunately, the Commission has recognized this latter problem and proposed a regulation governing holder in due course * * *." (Tr. 41.)

[219] The National Consumer Law Center is the national backup center for OEO's Legal Service Projects in the area of consumer protection. See R. 841, 844.

[220] Tr. 203, 211.

[221] Elberson, supra note 61 at Tr. 58; Halliburton, supra note 188 at Tr. 561–562; McKaig, supra note 42 at Tr. 621; Preloznik, supra note 189 at Tr. 698–699.

[222] Ross, supra note 156 at Tr. 872.

[223] "A final suggested revision of the provisions relating to cancellation concerns the running of the 3-day period. The proposed rule should adopt the procedure used in the cancellation provisions of Truth-in-Lending. Under that statute, the 3-day period does not start to run until the consumer has received all of the material disclosures required by the Act (15 U.S.C. 1635)." (R. 2403.)

[224] R. 794.

[225] Tr. 284–303; R. 858–877.

[226] "To say that chaos and hopeless confusion will exist is to understate the results. No one really knows * * * whether the rule rescinds the State laws or whether the State laws are superior to the rule * * *. Since the conflicting terms of the State statute make it impossible for an interstate seller to comply with both the statute and the rule, he is forced to operate at his peril no matter which he chooses to follow * * *." (Views and Argument of Crowell Collier and Macmillan, Inc., R. 1855.)

[227] R. 1789–1811.

it is unlikely that compliance with the proposed rule would result in the seller being fully in compliance with the law of the State in which the sale was made.

Certain industry spokesmen say that the advantages of uniform Federal regulation in this area are clear and cite the following as the most significant:

1. The consumer would be aware of his rights on a national basis; if he moved from one State to another, his rights of cancellation would not be changed.

2. Members of the industry could devise a contract and cancellation procedure which would be applicable throughout the country and hereby avoid a considerable expense.

3. A uniform rule would make it much easier to train and to retain salesmen.

4. Internal administrative controls necessary to insure compliance with the cooling-off procedure would be greatly simplified.

5. The reduced cost of compliance could be expected to encourage industry members to comply fully with the law and at the same time lessen the distribution costs which are ultimately passed along to the consumer.[228]

Despite their doubts as to the authority of the Commission to promulgate this rule, industry representatives are most insistent that if it is promulgated, the Commission must include a specific provision as to the preemptive effect of the rule. They go on to say that harmonization of requirements is one of the principal responsibilities of the Commission and that if such a provision is not included, it will pose extreme difficulties for the industry, particularly with respect to the smaller companies operating in more than one State. In accomplishing this preemption industry wants the Commission to state clearly and specifically that it intends to occupy the field and thus leave no room for State regulation.[229] As a precedent for this approach industry cites the action of the Federal Reserve Board in promulgating Regulation Z under the Consumer Credit Protection Act, 15 U.S.C. section 1601, wherein it provided in section 226.6(b) of that regulation, among other things that State law will be inconsistent to the extent that it requires disclosures "different from" the requirements of Regulation Z with respect to form, content, terminology, or time of delivery.[230]

Industry urges that if the Commission does not believe that it has the authority to occupy the field, and prescribe uniform cooling-off procedures of nationwide applicability that it should so inform Congress and recommend that appropriate legislation be enacted for this purpose, including language such as that used in S. 1599 of the 90th Congress.[231] In this connection it should be noted that section 7 of the bill stated:

> This Act shall not be construed to annul, or exempt any seller from complying with, the laws of any State or municipality regulating door-to-door selling, except to the extent that such laws, if they permit such selling, are directly inconsistent with the provisions of this Act.

The foregoing provision would indicate that in the opinion of its drafters the bill pertained to matters which were subject to both Federal and State regulation. In this area the decisions preclude State legislation only where there is a direct and positive conflict between the statutes to the extent that they cannot be reconciled and stand together, or where there is thought to be a congressional intent to occupy the field to the exclusion of State law on the same subject matter.[232]

It has also been held that the laws of a State must yield if they are incompatible with Federal legislation or with rules and regulations issued pursuant to authority delegated by Congress.[233] However, the mere grant of authority to a Federal agency of power with respect to a certain subject matter does not, in itself, supersede State law or prevent a State from making and enforcing regulations on the same subject matter.[234] It is only after the agency has acted and issued regulations which conflict with State law that the latter would be superseded, and then only to the extent that they conflict.[235]

It is apparently in recognition of these principles that the industry is so insistent upon a clear expression of an intent by the Commission to occupy the field. Thus the question becomes not so much whether the Commission has the power to supersede State laws and regulations, but whether it should.

In the past the Commission has recommended and encouraged the enactment of State and local laws, patterned after the Federal Trade Commission Act, in order to enlist the resources of the States in the constant battle to protect the consumer from unfair and deceptive trade practices. This policy was premised on the hope that the States would have the weapons they needed to combat business practices which were beyond the reach of Commission jurisdiction, and perhaps to exercise greater powers with respect to businesses which might be subject to the jurisdiction of both the Commission and the States. However, apparent inconsistency between State and Federal regulation does not always result in the former being struck down. Thus in Swift & Co. v. Wickham, 364 F. 2d 241 (2d Cir. 1966), the court held that a Federal poultry labeling regulation did not preempt a more detailed and stringent New York State regulation prescribing the manner in which poultry products in that State should be weighed, measured, and labeled.

It would seem that the Commission should not abandon its policy of cooperative and complimentary actions with the States in the matters covered by this rule in the absence of cogent and compelling reasons for doing so. If the State cooling-off laws give the consumer greater benefit and protection in regard to notice, time for election of the cancellation remedy, or in transactions exempted from this rule, there seems to be no reason to deprive the affected consumers of these additional benefits. On the other hand in those States which do not have cooling-off laws, or which have laws which do not accord the consumer protection and benefits provided in this rule, the rule would supply the needed protection or be construed to supersede the weak statute to the extent necessary to give the consumer the desired protection.

It would also seem that a relatively clear expression of the Commission's intent with respect to preemption would be helpful and better define the issues for judicial review should this be forthcoming.

Accordingly, note 2 to the revised proposed rule contained a statement expressing the Commission's view of the effect of the rule upon State statutes. Simply stated, note 2 provided that, with respect to transactions subject to the rule, the seller should accord the consumer the greater of the benefits provided by the rule or by the law of a State or political subdivision thereof which may also be applicable to that particular transaction.

The additional comments submitted on the revised proposed rule again reflected the serious concern of industry members as to the effect of the rule in the light of State statutes and municipal ordinances which contain cooling-off provisions. The most recent compilation of the Direct Selling Association shows that 31 States, the District of Columbia, and nine cities have such legislation.[236]

Industry members did not believe that the statements in note 2 provided solutions to the problems they anticipated would arise under State laws which imposed different requirements from those

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[228] Tr. 290–291.

[229] Id. at 286,297, citing Pennsylvania v. Nelson, 359 U.S. 497 (1956).

[230] Tr. 299.

[231] Tr. 302.

[232] Southern Pacific Co. v. Arizona, 325 U.S. 761, 766 (1945; Head v. New Mexico Board, 374 U.S. 424, 431 (1963).

[233] Free v. Bland, 369 U.S. 663, 668 (1962).

[234] Southern Pacific Co. v. Arizona, supra, note 232 at 765; Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141, 143–144 (1963).

[235] Sperry v. Florida, 373, U.S. 379, 385 (1963); Free v. Bland, supra, note 233 at 668.

[236] R. 2229–2237.

set forth in the rule.[237] One suggested solution was for the Commission to make the rule applicable only in those States which did not have a cooling-off law.[238] Another was that the Commission follow the procedure of Regulation Z and permit those States which had requirements substantially the same as those embodied in the rule to apply for exemption.[239]

Again, industry urged that it was the duty of the Commission to prempt State laws and municipal ordinances in order to achieve uniformity.[240] The proposal most strongly supported by industry members was that the Commission should, in the Notes accompanying rule, state clearly and explicitly that it intended the rule to preempt as to the form of the notice to be given the consumer and as to the method and manner of the exercise of the cancellation right.[241]

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[237] "There is one final area of concern to Sears and other large companies which do business in interstate commerce. That concern is the problem of complying with a Federal regulation of door-to-door sales as well as with 22 different State requirements and numerous other local ordinances on this same subject. As presently drafted note 2 of the rule would not alleviate this problem, but rather would add to the burden. Note 2(b) states that the Commission's rule will not preempt State and local requirements unless 'directly inconsistent' with the Commission's rule. This subsection then lists three types of provisions which would be considered 'directly inconsistent,' i.e., not providing a 'substantially the same or greater' right to cancel than provided in the rule; permitting a cancellation fee or penalty, and not requiring a notice to the buyer 'in substantially the same form and manner' as required in the rule. As a result it would appear that only State or local provisions which require less than 3 days 'cooling off' or permit a cancellation fee would be preempted." (Letter, Sears, Roebuck & Co., R. 2130.)

"We very much regret the Commission's decision (to) issue a rule which does not preempt the field of regulation of door-to-door sales. If the Commission's rule is adequate protection in States with no regulation of such sales, the rule is also adequate protection in States with stricter regulation. The addition of an FTC rule to the plethora of existing State regulations will merely confuse both buyers and sellers, and increases the cost of doing business without providing buyers with any additional important protection." (Statement on behalf of the Water Conditioning Foundation, R. 2287.)

"Another area of great concern is the extensive, wordy, involved and confusing clauses where it would appear necessary to have precise wording as required by the Federal Trade Regulation Rule and an almost exactly similar meaning but differently worded State requirement, as per the enclosed California clause. This State requirement, being not inconsistent with the T.R.R. requirement only different in the precise wording required. We will end up with a contract so long and involved that the customer probably won't read any of it. We urge strongly that compliance with the T.R.R. provide exemption from the need for duplicate clauses meaning the same thing. Where State requirements exceed the T.R.R. then require the additional wording only covering the excess point(s)." (Letter, Publishers Productions, Inc., R. 2317–2319.)

"We are very disappointed to find that the revised proposed rule does not seem to preempt State and municipal cooling-off requirements. If the Federal cooling-off requirement does not supercede those established at other levels of government, and sellers must simultaneously comply with several such similar but differing requirements, great confusion, and many complications will result. We strongly recommend that the proposed cooling-off trade rule provide for the preemption of all State and municipal cooling-off requirements." (Letter, National Institute of Locker & Freezer Provisioners, R. 2279.)

"Note 2 of the proposed rule discusses the problem of preemption, but does nothing to solve the problem. The rule should contain an affirmative statement that compliance with this rule will exempt any seller from complying with the laws of any State or any political subdivision which legislates in the same area." (Letter, National Association of Installment Cos., Inc., R. 2336.)

"We are not at all certain of the exact meaning of the two 'preemption' paragraphs which appear on page 5 of the proposed rule. In paragraph (a) the Commission states that it is aware of the burden imposed by inconsistent statutes but that it believes that this disadvantage is outweighed by the need to have 'joint and coordinated efforts of both the Commission and State and local officials.' Then, in paragraph (b), the Commission purports to 'annul' laws or ordinances which 'are directly inconsistent with the provisions of this rule.' The paragraph then goes on to describe several ways in which a State statute will be considered inconsistent." (Letter on Behalf of Crowell Collier and Macmillan, Inc., R. 2417–2418.)

[238] If the Federal Trade Commission believes it is not justified in preempting this field of regulation (which action would simplify matters for sellers) then we suggest that, to avoid the confusion of duplicate and different NOTICES, the Federal Trade Commission modify the applicability of its proposed Rule, so that the Rule applies only in those States (as determined by the Commission) whose own regulations on the subject are less stringent than the proposed Rule, or nonexistent." (Letter, International Telephone & Telegraph Corp., R. 2345.)

[239] Letter, American Credit Corp., R. 2343–2344.

[240] "Dart Industries has gone on public record in support of the Commission's proposed trade regulation rules on cooling-off and franchising because we believe both the consumer and business benefit from clearly defined rules of fair methods of competition which are applicable to all businesses in an industry. We are deeply disappointed, therefore, to learn that the Commission will refuse to preempt conflicting State and local news.

"The principal justification for the Commission to have rulemaking authority is to provide certainty and uniformity in the application of its policies. But without preemption, trade regulation rules have neither certainty nor uniformity. We believe both the consumer and business deserve a Commission willing to exercise the full limit of its authority—in preemption of conflicting laws, as well as in rule-making." (Letter, Dart Industries, Inc., R. 2135.) See also, letter, Miller Stormguard Corp., R. 2168.

In its statement Field Enterprises Educational Corp. said: "We strongly urge the Commission not to abandon its Federal responsibility in the area of form, even if it is intent upon permitting continued State and local regulation on all matters of substance. We urgently request deletion of the word 'substantially' from Note 2, Paragraph (b) if that is necessary to avoid this confusion, and the deletion of the word 'substantially' from the Revised Proposed TRR's opening paragraph (a) as well if that will further this objective." (R. 2247.)

[241] "We are specifically troubled by the statement with respect to the form of notice to the buyer of his rights. To the best of our knowledge there is not one form required in any of the 22 States which now have door-to-door sale laws which could be classified 'substantially the same.' The practical effect of such a provision is that interstate businesses will have to provide two forms of notice in these 22 States, and in some municipalities in those States the buyer will be given three forms of notice. This is obviously inimical to the concept of providing consumers with useful information as to their rights. This can only lead to confusion.

"We suggest, therefore, that either the Commission preempt all State and local door-to-door sale requirements except those which provide greater protection, such as requiring more than 3 days 'cooling off' or applying the requirement to sales amounting to less than $25, or, at the least, amend the phrase in Note 2(b) dealing with the form of notice to the buyer to read:

> * * * or which do not provide for giving the buyer notice of his right to cancel the transaction in exactly the same form and manner provided for in this section * * *

"The effect of such an amendment with respect to the form of notice would be to assure that only one form of notice will be given to consumers. This will not only reduce administrative problems and expense on the part of door-to-door sellers, but will reduce confusion on the part of consumers and thus make this rule a much more valuable consumer protection regulation." (Letter, Sears, Roebuck and Co., R. 2130–2131.)

Field Enterprises Educational Corp., concurred in this recommendation: "FEEC's other major concern relates to the question of preemption. We recognize that the Commission has decided against total preemption of all State and local action in this area, however logical and desirable the resulting economies and ease of enforcement might be from the consumer point of view. Thus State and local governments will still be free to license or ban door-to-door salesmen, to regulate their statements at the door, to impose a cooling-off period of more than 3 days, to apply the right of cancellation to sales under $25, and to promulgate other substantive regulations in this area. But nothing can be accomplished except needless expense and confusion by the Commission's failing to preempt as to form.

"Whatever the Commission finally decides on the questions raised earlier in this statement, it should promulgate the best possible requirements as to form that give the consumer all possible protection. Once that is done, what is to be gained by requiring a seller to print another separate notice for Hawaii stating that cancellation must be by certified mail, return receipt requested, another one for Indiana which words the caption differently, still another for New Hampshire, which requires 12 point type, and another for Arizona, if it passes the pending bill requiring a different colored notice, and another for New York, where the notice must be on a perforated card, and still another for Connecticut, with its far wordier notice, and another for Columbus, Ohio, where goods must be picked up 10

The Commission remains of the view that it is essential to have State cooperation and assistance in insuring that consumers were provided with a cooling-off period in door-to-door sales by State legislation and enforcement and that the preemptive effect of the rule should be limited to the provisions of State laws which do not accord the consumer protection and benefits equal to or greater than those provided in the rule. Critical industry examination of this concept shows that it may well result in almost every case in the consumer being furnished with duplicate notices of his right to cancel the sale—one in compliance with the applicable State law, the other meeting the criteria expressed in the rule.[242]

While this may be considered unwise by some, outright preemption of State laws, assuming for the moment that the Commission has the authority to do so, would in effect take the States out of the business of enforcing cooling-off provisions except in those transactions not subject to the Commission's jurisdiction. This solution would not be satisfactory.

The suggestion that the Commission exempt from the requirements of the rule transactions in those States which have laws substantially the same as the rule, would on its face appear to provide some relief. However, it is doubtful whether any State could satisfy this criterion.

The suggestion that the Commission preempt as to the form of notice to be given the consumer and as to the method and manner of the exercise of the cancellation right is equally unacceptable. Its adoption would in fact result in a preemption of virtually all of the provisions of State laws as these laws largely require that the sales contracts include specific language designed to inform the consumer of his rights and obligations under the applicable State law. Without such provisions the State laws would become hollow shells and virtually ineffective.

At the time this proceeding was initiated only 14 States had enacted cooling-off laws. Now, as pointed out above, over two-thirds of the States have such laws. Based on their experiences under their respective laws, State legislatures have shown little hesitation in adopting amendments for the purpose of refining the initial enactments to provide the consumer with greater protection.[243] While a number of these statutes do not afford the consumer the same degree of protection as the rule, they are consistent in that they accord the consumer the unilateral right to cancel the transaction—which is the principal purpose of the rule. While the mechanics of the rule, i.e., those provisions which are designed to insure that the consumer is informed of the cancellation right, told how to exercise it, and advised of the rights and obligations of the parties following cancellation are not of paramount importance, it is in this area that the dual compliance with the requirements with the rule and the various State statutes becomes most difficult. For example, there would be little difficulty in harmonizing the varying lengths of the cooling-off period provided by State laws with that of the rule. If the State law authorized a 5-day cooling-off period, sellers would be required to comply. If the State law offered only 2 days, sellers would be required to comply with the 3-day period provided by the rule. However, conforming the mechanics of the rule with the mechanics of the numerous State statutes, which authorize the imposition of a fee or penalty upon the consumer who cancels, and which provide for such things as different forms of notices, different methods of cancellation, and different procedures for the recapture of delivered goods, would require the use of so many variables that consistency would become an almost unattainable objective.

It should be recognized that the essential provisions of a cooling-off rule or statute are those which give the consumer a unilateral right to cancel a sale within 3 days, without penalty or fee, and which require that he be informed of this right both orally and in writing. All of the other provisions are ancillary, and it is in this area that the most troublesome differences occur. In the interest of both the consumer and industry it appears that the Commission should seek uniformity in cooling-off procedures at the Federal and State level and encourage the various States to eliminate or change those requirements of their respective laws which are inconsistent with this rule. Accordingly, specific actions designed to promote and foster uniformity will be advised and implemented by the Federal-State Cooperation Unit in the Office of the Director of the Bureau of Consumer Protection.

CHAPTER XII. EFFECTIVE DATE OF THE RULE

Industry representatives originally stated they would need 9 months following promulgation of the rule to change contracts, train sales personnel, adjust computers, and take the other actions necessary to implement the rule following its promulgation.[244]

In the notice which included the revised proposed rule when it was released for comment, industry members and other knowledgeable persons were specifically invited to provide information relative to the length of time industry members would need to make the necessary arrangements to comply with the

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days after their return is tendered, and so on and on and on?

"No single form could possibly harmonize all of these conflicting requirements. Thus a multiplicity of forms will be required, most likely a separate one for every State and locale with a cooling-off statute. In many instances the State or local form may not be capable of even substantial harmonization with the Federal form, and the prudent seller will feel compelled to give the buyer to conflicting forms." (R. 2245–2246.)

Encyclopaedia Britannica concurred and said: "Indeed, as to matters of form, EB believes that there is an affirmative constitutional mandate that there must be preemption in this case. It has long been a settled principle of constitutional law that there are certain areas of commerce which demand uniformity of regulation and that the lack of uniformity which would result from efforts by local bodies to regulate such areas, even without specific preemptive action at the Federal level, would impose an undue burden on interstate commerce. *E.g.*, Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945); Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959). The decision whether to permit local regulation in such cases is to be resolved by weighing and balancing the competing Federal interest in the unimpeded flow of commerce with the local interests in the subject of regulation (325 U.S. at 770–71). Here it cannot be disputed that the need to comply with a host of conflicting regulations as to the form in which the consumer is advised of his right to rescind a contract in light of the host of actual and potential local cooling-off laws would substantially impede the operation in commerce of the companies who would be subject to the proposed Trade Regulation Rule * * *." (R. 2252–2253.)

[242] Ibid. See also statement submitted on behalf of Crowell, Collier and Macmillan, Inc., wherein it is stated: "We assume that the Commission has adopted this strange position in the belief that by so doing it will gain the enforcement muscle of the State and local authorities. This seems unlikely. Local prosecutors certainly do not have the power to prosecute violators of Federal statutes or even trade regulations rules promulgated by the Federal Trade Commission. If the inconsistent State statute has been 'annulled' (a consequence we seriously doubt), there is nothing left for the local officials to enforce against an interstate seller.

"What happens in the States in which only part of the State statute is inconsistent with the Commission rule? For example, the State of Hawaii permits a cancellation fee. Is the entire State statute annulled or only the cancellation fee? What happens if a State requires notice of cancellation by certified mail, return receipt requested? Is such a statute entirely annulled simply because of this provision?

"The legal problems created by this Commission approach stagger the imagination. The Commission should either 'bite the bullet' and preempt all State legislation or make its rule operative in only those States which do not have cancellation statutes. National sellers are able to cope with a multiplicity of State statutes, but they cannot operate when the Federal and State requirements overlap and no one is certain as to which must be followed. The very least the Commission can do is to analyze all State statutes and local ordinances and publicly announce which are annulled and which remain in full force. The public interest requires no less.

"In closing on this point, we believe that the Commission's fears that complete preemption of all State statutes by the rule would create an enforcement hiatus are unfounded. All sellers big enough to conduct a substantial interstate business will make the required changes in their contracts and procedures. After all, enforcement of this type of rule is inexpensive and uncomplicated. Moreover, this approach has the advantage of leaving the State statutes in full force and effect with respect to intrastate sellers. The jurisdictional lines between State and Federal authorities are preserved, and the entire legal picture is much clearer." (R. 2418.)

[243] Hawaii, Massachusetts, Illinois, and the city of New York are among the jurisdictions which have revised previous enactments.

[244] Tr. 881, R. 794.

rule following its promulgation in final form. Industry recommendations on this point ranged from a low of 60 days to a high of 2 years, with perhaps the majority agreeing that 6 months should be sufficient.[245]

Among the factors which it was said should be considered were time to design and print the revised contract forms and notices, distribution of these to the various offices in the field, training of sales personnel in the use of the new forms, and finally a reasonable period to permit exhaustion of the existing stocks on hand.[246]

Encyclopaedia Britannica recommended that the rule be made effective upon promulgation with the understanding that companies who are unable to comply with its provisions be granted a 6- to 9-month grace period.[247]

The view of the Commission which is shared by at least one consumer group [248] is that the rule should become effective as soon as possible but that the practical obstacles to prompt action on the part of most industry members should be recognized by allowing them a maximum of 6 months to comply with the rule.

The Commission has carefully considered whether it would be best to issue the rule in the form of a policy statement or guide, or to issue it in its present form and to defer its effective date. The affirmative requirements of this rule do not lend themselves to either a guide or a policy statement format. Moreover publication of either a guide or a policy statement would not reduce the enforcement problems or enhance the possibility of industry compliance in the interim period. Accordingly, the Commission has decided to promulgate the rule.

In view of pending litigation regarding the Commission's rulemaking authority, the Commission has decided to defer the announcement of an effective date for this rule. It should be noted, however, that this rule constitutes an expression of the Commission's view of what should be the application of section 5 of the Federal Trade Commission Act to door-to-door transactions. The Commission will encourage all States and localities with cooling-off legislation to begin immediately to remove inconsistencies between their cooling-off requirements and the provisions of this rule, in order to remove the burden of compliance with differing requirements at the State and Federal level.

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[245] Airline Schools Pacific of Van Nuys (R. 2182); National Pest Control Association, Inc. (R. 2284); Direct Selling Association (R. 2225); Ad Hoc Committee (R. 2263); Crowell, Collier and Macmillan, Inc. (R. 2419).

[246] "An effective date, 6 months after promulgation of the Rule, would allow sufficient time to prepare new contract forms, have them printed, and distributed to all sales representatives. It would also enable most companies effectively to reach and train all sales and administrative personnel in the mechanics of operation, as well as the imperative for compliance with the spirit as well as the letter of the Rule." (Stephen Sheridan, vice-president, Electrolux, R. 2180.)

[247] R. 2254.

[248] Virginia Citizens Consumer Council, Inc. (R. 2406).